116-642

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~550~~. 87

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CLAYTON D. HERBERT.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED OCTOBER 10, 1882.

SUPREME COURT OF THE UNITED STATES.

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No. 356.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

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CLAYTON D. HERBERT.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

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a TERRITORY OF DAKOTA:

Supreme Court. October Term, 1881.

CLAYTON D. HERBERT, Respondent,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Appellant. } No. 118.

Record.

W. P. Clough, attorney for appellant.
Filed May 8th, 1882.

B. S. WILLIAMS, *Clerk.*

1 TERRITORY OF DAKOTA:

Supreme Court. October Term, 1881.

TERRITORY OF DAKOTA, *County of Burleigh:*

District Court, Third Judicial District.

CLAYTON D. HERBERT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff alleges that the defendant is a corporation duly created, organized, and existing under that certain act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," approved July 2, 1864, and the acts amendatory thereof. He further alleges that more than
2 two years ago the said defendant had constructed a portion of the said road, which it was by said act authorized to construct, from Duluth, in the State of Minnesota, to Bismarck, in the Territory of Dakota, and that the said defendant has continuously, for more than two years last past, been operating the said road so constructed as aforesaid.

2.

That the plaintiff, on the twenty-fourth day of October, 1879, was in the employ of the defendant as brakeman in the defendant's yard at Bismarck aforesaid. That in said yard freight and other cars of the defendant were switched by steam power upon the different tracks in said yard, and trains of freight and other cars were made up to run out on defendant's railroad.

3.

That at the time and place aforesaid it was the plaintiff's duty as such brakeman as aforesaid, among other things, to attend, set, and loosen the brakes when necessary, and whenever ordered so to do by the defendant's yard-master at Bismarck aforesaid, upon cars which were being moved and switched in said yard.

4.

That at the time and place aforesaid this plaintiff, as such brakeman and employé as aforesaid, was ordered by the defendant's yard-master at said place to go upon, brake, and stop two certain freight cars, numbered 1804 and 2280, which the said yard-master had theretofore propelled by steam power and switched upon a particular track in defendant's said yard at Bismarck.

That plaintiff, in the discharge of his duty as brakeman as aforesaid, and in obedience to the command and direction of the defendant's yard-master, at the time and place aforesaid, went upon said freight cars Nos. 1804 and 2280 for the purpose of braking and stopping the same.

That plaintiff, in going upon said cars, went upon car numbered 1804 first, and attempted to set the brake upon and attached to said car.

That said brake was badly broken and out of order, and would not and could not be made to brake or stop the said cars, and was utterly useless for any purpose. That as soon as plaintiff discovered that the brake on said car 1804 was in bad condition and useless, as aforesaid, he stepped to the brake on said car 2280 for the purpose of braking and stopping said cars.

That the brake on said car 2280 was what is termed and known as a "step brake," and the plaintiff, in attempting to set said brake for the purpose aforesaid, was obliged to and did step down with his left foot on the step attached to said car and brake, which brought the plaintiff's left foot and limb between the said cars 1804 and 2280.

That the said brake on said car 2280 was defective and out of order, and that while the plaintiff was attempting to set the brake on said car 2280, for the purpose aforesaid, and while the plaintiff's left foot was upon the step to said car 2280, as aforesaid, the said cars 2280 and 1804 struck certain other freight cars then standing upon the same track in defendant's said yard.

That said car 1804, at the time and place aforesaid, was broken, defective, and insecure in respects other than the brake thereon and thereto attached, as hereinafter stated, namely, in that the dead wood and draw bar on said car, and thereto attached, had been theretofore pulled out, and was then out, and the said cars 1804 and 2280 were then and there chained together.

That when the said cars 1804 and 2280 struck the said stationary cars upon the same track, as aforesaid, the said cars 1804 and 2280, by reason of their broken and defective condition, as aforesaid, came suddenly and forcibly together, and in coming together as aforesaid caught and crushed and destroyed the plaintiff's left leg.

5.

That at the time and place aforesaid it became and was the duty of the said defendant to procure and provide good, safe, and secure

cars, with good, safe, and secure machinery and apparatus for braking and handling the same.

That it then and there became and was the duty of the said defendant to make rules and regulations for the switching of cars in the defendant's said yard, and for the notification of the employés therein of the defective condition of defendant's cars when broken and defective, so that said employés might not be subjected to unnecessary peril or danger.

6.

That the defendant, not regarding its duty in that behalf, carelessly and negligently provided and used and suffered to be used, at the time and place aforesaid, unsafe, broken, and defective cars, and broken and defective machinery and apparatus for switching and handling the same; all of which the defendant then and there well knew, or, but for the want of proper care and diligence, the defendant would have known the same.

That at the time and place aforesaid the defendant, contrary to its duty in that behalf, failed and neglected to make rules and regulations for the switching of cars in defendant's said yard, and failed or neglected to make rules and regulations for the notification of its employés therein of the defective and broken condition of its cars, or of the defective and broken condition of the machinery, brakes, and apparatus upon said cars, and necessarily used in the switching and handling of said cars; and at the time and place aforesaid carelessly and negligently failed and neglected to give the plaintiff any notice of the broken and defective condition, as aforesaid of said cars 2280 and 1804, or of the broken and defective state and condition of the brakes on said cars 2280 and 1804, or of either of the same, or that the dead-wood and draw-bar had been pulled out, and was then out of said car 1804, or that the said cars were chained together as aforesaid; and the plaintiff avers that at the time and place aforesaid, nor at any time prior to the injury hereinbefore alleged, had he any notice or knowledge whatever of the broken and defective condition of said cars 2280 and 1804, or of either of said cars, or of the brakes on said cars or either of the same, or that the dead-wood and draw-bar had been pulled out, and was then out of the said car 1804, or that said cars were chained together, as hereinbefore alleged.

7.

That by reason of the aforesaid premises, and by reason of the gross neglect and carelessness of the defendant, as aforesaid, and without any default on the part of the plaintiff, the plaintiff, at the time and place and in the manner aforesaid, had his left leg crushed so that it became and was necessary, in order to save the life of the plaintiff, to have the same amputated; and the same was amputated.

8.

That by reason of the premises the plaintiff has sustained damage in the sum of $25,000.

Wherefore the plaintiff demands judgment against the defendants for the sum of $25,000.

WILSON & BALL,
Plaintiff's Attorneys.
THOMAS WILSON,
Of Counsel.

6 TERRITORY OF DAKOTA, *County of Cass:*

Clayton D. Herbert, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

C. D. HERBERT.

Subscribed and sworn to before me, this twenty-seventh day of January, 1881.

WILBUR F. BALL,
Notary Public, Cass Co., D. T.

Summons.

TERRITORY OF DAKOTA, } ss:
Third Judicial District, }

In the District Court in and for Burleigh County.

CLAYTON D. HERBERT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The Territory of Dakota sends greeting to the Northern Pacific Railroad Company, defendant:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which said complaint is hereto annexed and herewith served upon you, and to serve a copy of your answer on the subscribers, at their office, in the city of Fargo, Cass county, Dakota Territory, within 30 days after the service of this summons on you, exclusive of the day of such service;
7 and if you fail to answer said complaint within the time aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

WILSON & BALL,
Plaintiff's Attorneys, Fargo, D. T.
THOMAS WILSON,
Of Counsel.

TERRITORY OF DAKOTA, *County of Cass:*

I hereby certify and return to the within summons and complaint that on the twenty-seventh day of January, A. D. 1881, at Fargo, in said Cass county, I served the within summons and complaint on the defendant, by then and there delivering to and leaving with H.

E. Sargent, the general manager of said company defendant, true copies of said summons and complaint.

Dated January 27, 1881, at Fargo, D. T.

Fee, $1.05. J. E. HAGGART, *Sheriff*,
By C. W. HAGGART, *Deputy*.

The Answer of the Defendant to the Complaint of the Plaintiff.

TERRITORY OF DAKOTA, *Burleigh County*:

District Court.

CLAYTON D. HERBERT, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The defendant denies each and every allegation in the
8 complaint contained, save as hereinafter expressly admitted; and denies that the plaintiff suffered any greater damage by reason of the injuries set forth in the complaint than the sum of $2,000.

The defendant admits that it is and has been a corporation, as alleged in the complaint; that the plaintiff was, at or about the time mentioned in the complaint, a brakeman, employed by the defendant, in its yard at Bismarck; that in such yard, at the time the plaintiff was so there employed, the cars of the defendant were switched, and trains of freight and other cars were made up, to be run upon defendant's railroad; that as such brakeman, part of plaintiff's duties was to attend, set, and loosen the brakes, when necessary or when he was properly ordered to do so, upon cars while being switched and moved in such yard; that at or about the time alleged in the complaint, two freight cars, numbered respectively as in the complaint set forth, were in defendant's said yard, and were moved in the ordinary way and in a proper and careful manner from place to place therein; that the said car No. 1804 had, prior to the arrival at the said yard, which was at or about 3 o'clock and 45 minutes in the afternoon of the said day, been disabled, so that the same was attached and coupled to the said other car, No. 2280, by chains; that such car was so disabled, and reached such yard in a defective condition, without any fault or want of care on the part of the defendant; that shortly after the arrival of said cars in said yard, and while the same were being carefully and properly moved about for the purpose of separating the same from the other cars in the same train, the plaintiff, while setting the brake upon the said car No. 2280, received an injury to one of his legs by the same being caught and jammed between the said two cars, and that such injury necessitated the amputation of such leg.

Further answering, the defendant alleges that, both prior to and at the time when the plaintiff undertook to set the brake of the said
9 car, it was his duty as such employé to know, and he did know, the condition of each of the said two cars, and that the said car No. 1804 had been broken, as in the complaint and in this answer alleged; and that the said two cars were attached

and coupled with chains as aforesaid; and that it would be highly dangerous to place his legs or any part of his person between the said cars for any purpose whatever, for the reason that the said two cars, if the motion thereof should be suddenly arrested, would be liable to come together.

Defendant further alleges that the plaintiff carelessly and negligently, and well knowing the condition of said cars and his peril in so doing, placed his said leg between the said two cars while setting the said brake as aforesaid; and that while the plaintiff's said leg was so between said cars, solely by reason of his carelessness and negligence, and not from any fault or negligence of this defendant, the plaintiff's said leg was hurt as aforesaid.

And defendant further alleges that the injuries so as aforesaid received by the plaintiff are the said injuries complained of in the complaint, and no other or different injuries.

Wherefore defendant prays judgment that he be hence dismissed with his costs and disbursements herein incurred.

W. P. CLOUGH,
Attorney for Defendant.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Homer E. Sargent came before me personally, and, being duly sworn, doth say: That he is general manager of the defendant in the above-entitled action; that the foregoing pleading is true of his own knowledge, except as to the matters which are stated therein on his information and belief, and as to those matters that he believes it to be true.

HOMER E. SARGENT,
General Manager.

Subscribed and sworn to before me this eighth day of March, 1881.

[SEAL.]

OTTO KUEFFNER,
Notary Public, Ramsey County, Minn.

TERRITORY OF DAKOTA:

Burleigh County District Court.

CLAYTON D. HERBERT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff in the above-entitled action, for reply to the answer of the defendant in the said action, denies each and every allegation of new matter therein contained.

WILSON & BALL,
Plaintiff's Attorneys.
THOMAS WILSON,
Of Counsel.

TERRITORY OF DAKOTA, *County of Cass,* } *ss:*

Clayton D. Herbert, being first duly sworn, says: That he is plaintiff in the above-entitled action; that he has read the foregoing reply to defendant's answer; that he knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters he believes it to be true.

CLAYTON D. HERBERT.

11 Subscribed and sworn to before me, this tenth day of March, A. D. 1881.

[SEAL.]

WILBUR F. BALL,
Notary Public, Cass Co., D. T.

Case, with Exceptions.

TERRITORY OF DAKOTA, *County of Burleigh:*

In District Court, Third Judicial District.

CLAYTON D. HERBERT, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This cause come on to be heard at the May term, A D. 1881, of the said court, and thereupon evidence was adduced, proceedings had, rulings made, and exceptions taken, as hereinafter set forth, to wit:

The jury found a verdict for the plaintiff for the recovery of the sum of $25,000.

The defendant excepts to the said verdict upon the grounds following, that is to say—

I. The damages awarded thereby are excessive, and appear to have been given under the influence of passion or prejudice.

II. Errors of law occurring at the trial, and excepted to by the party making the application.

Said errors consist in the several rulings of the court upon the several challenges to jurors, made respectively by the plaintiff or the defendant, and in the several rulings upon the admission or rejection of evidence upon the several objections made by the
12 plaintiff or the defendant, and by the refusal by the court to dismiss the suit at the conclusion of the plaintiff's case in chief, and in the refusal by the court of the several requests of the defendant for instructions to the jury, and the granting of the several requests of the plaintiff for instructions to the jury, and the giving of the several instructions to the jury by the court of its own motion, all which rulings, refusals of requests to charge, grants of requests to charge, and instructions given fully appear below.

III. The evidence adduced upon the trial was insufficient to justify the verdict, and the said verdict was contrary to law, because—

1. The evidence did not show that the injury to the plaintiff, set

forth in the pleadings, was occasioned by the negligence of the defendant.

2. The evidence did show either that such injury was the result of inevitable accident, or that it was the result of the plaintiff's own negligence, or that it was the result of the negligence of other persons employed by the defendant in the same general business with the plaintiff.

The proceedings had and evidence given upon the trial were as follows:

Testimony—Examination of Jurors.

CLAYTON D. HERBERT
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

The court ruled that the parties should each go on alternately with their challenges for cause until both are through with
13 the panel, when each shall exercise their right of peremptory challenge in the same manner and pursue the same course in regard to new jurors called to fill vacancies; to which ruling of the court the defendant excepts.

P. R. SMITH, being called as a juror, and first duly sworn to make true answers touching his competency to sit as a juror in this case, is examined as follows by counsel for defendant:

Q. Mr. Smith, you know the nature of this case?
A. Yes, sir.
Q. You were living here in Bismarck at the time of the accident?
A. I was, sir.
Q. Did you know anything in regard to the accident?
A. Nothing further than general talk, and what I have seen. From the shop my attention was called to it by people running towards that direction. Inquired afterwards, and found out that it was this man got hurt.
Q. Did you inquire from persons who had been there and saw the accident?
A. I believe I have.
Q. You talked with them regarding it, did you?
A. Yes, sir.
Q. Did they pretend to give you a statement of the facts in regard to the case?
A. Yes, sir; stated the condition of the cars.
Q. The condition of the cars, etc.?
A. Yes, sir.
Q. Was there anything said about the negligence of the company?
A. I believe there was.
Q. From what you heard and what you know, Mr. Smith, have you formed or expressed an opinion on the case?
14 A. I have not, further than this way. I can state the whole thing: I was told this car was in bad condition and moved without an order to this man, and on that theory I said if such was

the case—the yard-master didn't notify him of this bad car—the company ought to pay.

Q. You have that opinion, that unless the yard-master notified him the company ought to pay? Have you formed an opinion as to the amount of damages he ought to receive for the loss of his leg?

A. I know nothing about the compensation.

Q. Then, from what you know about the case, you have formed an opinion in reference to the negligence of the company?

A. No, sir; I have not. I said at the time, if they didn't notify him of this car, that in that case satisfied me on their liability.

Q. Then, if a juror on this case, your opinion would turn very largely upon the question whether or not the yard-master had notified the plaintiff of the bad condition of these cars?

A. That was the point raised at the time. As a matter of fact, under the oath as I have taken here, I should go entirely by the evidence.

Q. You formed an opinion at that time, and formed an opinion in that way? You have that opinion now?

A. I have, sir.

Q. And it would take evidence to remove that opinion, would it not?

A. Well, as a matter of fact, I haven't heard enough in the case.

Q. I say it would take evidence to remove that opinion?

A. No, sir; it would not.

Q. Then you haven't any opinion now?

A. I haven't any opinion now further than what I stated.

Q. I mean that opinion you stated. It would take evidence to remove that opinion, would it not?

A. Yes, sir.

Q. In other words, it would take evidence to show that the company weren't negligent; that they had notified this man, or something of that kind?

A. Well, if it was proved on the other side that they hadn't and the company didn't prove it, then I would feel——

Q. What I mean is that it would take evidence to banish the opinion from your mind?

A. I don't know anything about the case further than that.

Q. You have that opinion?

A. I have no opinion now only what I supposed at that time.

Q. But you still have that opinion?

A. In such a case.

Q. Now, it would take evidence to change that opinion, wouldn't it, to remove that opinion from your mind?

A. I don't——

Q. If such was proved to be so, that that was the case, then it would?

A. Of course; I tell you I have no opinion further than if such was the case, which I didn't know whether it was or not.

Q. You were told that such was the case by men who had been there and seen it?

A. Yes, sir; I wasn't told anything that wasn't notified; I was told about the car.

Q. About the car and the condition of the car by a man who had been there and seen it?

A. Yes, sir.

Q. Did you talk with several about it?

A. Yes, sir.

Q. And several who had been there at the time of the accident?

A. I don't know as they were there at the time of the accident; it was general conversation.

Q. The talk was common in town at that time was it not?

16 A. Yes, sir.

Q. Regarding the accident?

A. Yes, sir.

Q. Have you an opinion upon a case of this kind, as to the condition in which cars ought to be kept by the company?

A. Yes, sir.

Q. An unqualified opinion as to the condition cars ought to be kept in at all times by the railroad company?

A. Yes, sir; I know something about railroading; for that reason I have an opinion on that.

Q. You have an opinion on that?

A. Yes, sir.

Q. You have an opinion upon the duty of the company to *to* notify brakemen as to the condition of cars?

A. Yes, sir.

Q. You have an unqualified opinion on that?

A. Yes, sir.

Q. Have you an opinion upon the question at what time or how soon the company ought to repair a car after it was broken?

A. Yes, sir; I have an opinion that when a car is broken it should be side-tracked at the first side track before it goes any further; that is the general rule.

Q. You have a fixed opinion on that?

A. I believe that is the general rule.

Q. Have you ever had any talk with the plaintiff, Mr. Herbert?

A. The first talk I had with him was after he got hurt; I was made acquainted with him after that when he was lying there; I asked him how he felt.

Q. Did he ever make any statement to you of the facts of the case?

A. No, sir.

Q. Did he ever say anything to you in regard to the case?

17 A. I believe not, further than I heard that the suit was brought; I think I asked him once—the time—I could not tell how long it was; it must be a year ago, if he was going to sue them; he said yes.

Q. Did he state the amount of damages he was going to claim?

A. No, sir.

Q. No words upon *upon* that passed?

A. No words upon that.

Q. Have you talked or consulted with any of the jurors since you have been on this panel as to the merits of this case?

A. No, sir.

Q. Have you heard any talk about the merits of it?

A. Not until I came here.

Q. I mean prior to this morning?

A. No, sir.

Q. Have you any prejudice or bias against the railroad company, Mr. Smith?

A. No, sir.

Q. You are not a native-born American, are you, Mr. Smith?

A. No, sir.

Q. Born in Ireland, were you not, Mr. Smith?

A. Yes, sir.

Q. Have you ever taken out your second papers?

A. Certainly.

Q. In this court, or before you came here?

A. In Pennsylvania, before I came here.

Defendant rests his challenge under the sixth subdivision of section 214 of the Civil Code.

Cross-examination by attorney for plaintiff:

Q. Mr. Smith, let me ask you: Have you an unqualified opinion or belief as to the merits of the action, founded upon a knowledge of its material facts?

18 A. No, sir.

Q. You say that some folks that went over there where the accident was told you something about it. Have you now, or have you had, as far as you are conscious of it, any decided or settled opinion as to the rights of the parties as between themselves or against one another?

A. No, sir.

Q. You never have formed or expressed an opinion as to the right of recovery of this plaintiff, or the amount of recovery that there should be?

A. Never, except, as I have already stated, that he wasn't notified. I said, in case he was not notified by the yard-master, then he ought to recover damages.

Q. From what had been told you of the condition of the cars, you said if the cars were in such condition, and that the yard-master didn't notify him, that then they ought to pay him?

A. Yes, sir.

Q. That's all you ever said?

A. That's all.

Q. Did you make up your mind as to what was the condition of the cars, or rather, that the cars were as these persons stated to you?

A. Like the other statements, I took it for what it was worth.

Q. Did you make up your mind that that was true, or just assume that it was true?

A. I have made up my mind that the cars were in that condition just from what I heard.

Q. Was there anything stated to you except that that draw-bar and dead-wood were drawn out?

A. Nothing further, I believe.

Q. You made up your mind that if that was true the car was in bad condition?

A. Yes, sir.

Q. And that if it was left without giving notice to those who had to use it they ought to pay him for that?

19 A. Yes, sir.

Q. Have you formed an unqualified opinion, then, on that, Mr. Smith?

A. Not at all. I have not formed an unqualified opinion, for the reason I had no proof. Heard nothing of it, except general conversation.

Q. Sworn as a juror here in this case would you be governed in the least by anything you had ever heard, or would you be governed solely and exclusively by the evidence given on the trial and the charge given by his honor?

A. I would be governed entirely by the evidence and the court.

Q. Would you be governed in the least by anything you had heard before?

A. Not at all.

Q. If this plaintiff didn't go on and prove that the company had been negligent, that that you had heard before would go for nothing?

A. Yes, sir.

Q. Do you claim or did you ever claim to have a knowledge of the material facts of this case?

A. No, sir.

Q. You say you have not now, and never have had, an unqualified belief as to the merits?

A. Couldn't have, for I didn't see it.

Redirect examination by defendant's attorney:

Q. If it was admitted by the company that these draw bars were out and dead-woods were gone, you would conclude that the company were negligent?

A. Not on that theory I would not. My reason for expressing myself in that way was this: That in case they took that car from the side track with the chains after they brought it to the yard, before they allowed it to go out of this train, it was their

20 place, or the yard-master's place, to notify the yard-men of the condition of this car. In that case, if they failed, I would go against the company.

Q. If they failed to notify?

A. Yes, sir.

Q. That is, when the yard-master failed to notify the plaintiff?

A. Yes, sir; the yard-master, or some one there in the yard.

Q. You have an opinion in regard to the company moving a car after it has been disabled in that way, have you?

A. Yes, sir; that is my knowledge of railroading.

Q. Then, if that car was injured 40 or 50 miles out East, your opinion wouldn't allow them to bring it to Bismarck?

A. Not and leave it at the yard without notifying the yard-master and brakeman.

Q. If they did bring it to Bismarck, your opinion would be that it was negligence?

A. No; no; not excepting they didn't notify, as a usual thing.

Q. Then this case would turn very largely, in your mind, on the question whether the yard-master had notified the plaintiff of the bad condition of these cars, assuming it was omitted?

A. The yard-master, or somebody else.

Q. You would be governed almost entirely by that?

A. I would be governed to an extent.

Q. In case he didn't notify him, would you conclude that there was negligence on the part of the company, and that the plaintiff ought to recover?

A. I would, sir.

Recross-examination by attorney for plaintiff:

Q. You say that you would. Now, supposing you went onto this jury—was sworn as a juror—would you or would you not take the law in this case, as touching that, wholly and exclusively from the judge?

21 A. Undoubtedly, I would.

Q. If his views ran counter to your previous notions, what of them—would they go for nothing?

A. Go for nothing, certainly, if I was sworn as a juror.

Q. Would these previous notions have any influence whatever on you as a juror?

A. Not at all.

(Challenge overruled by the court, and to this ruling the defendant excepts.)

CONN MALOY, being called as a juror, and first duly sworn to make true answers touching his qualifications to sit as a juror in this case, is examined as follows by G. P. FLANNERY, attorney for defendant:

Q. Mr. Maloy, from hearing the pleadings read, and the statements here in court this morning, you are familiar with the nature of this action, are you not?

A. Yes, sir.

Q. The grounds of it?

A. Yes, sir; from what I heard this morning.

Q. Were you here in Bismarck at the time the accident occurred?

A. Yes, sir.

Q. Was you there at the yard at the time the accident occurred?

A. I was not there at the time it occurred; I was there soon afterwards.

Q. Did you see the cars?

A. I seen them, but never examined them.

Q. Did you notice their condition?

A. No, sir.

Q. Didn't look to see where or how the injury was occasioned, or why it was occasioned?

A. No, sir; I never looked. I paid my attention to the man.

22 Q. Was you there, and assisted to take the man away?

A. I didn't assist.

Q. Was you there when he was taken away?

A. I was there when he was taken in the Sheridan House.

Q. Did you talk with anybody there at that time in regard to the condition of these cars?

A. I don't remember hearing a word about the condition of the cars at all.

Q. Did you hear anybody make any remarks at that time about the condition of the cars?

A. Well, I can't say that I did, because my whole attention was paid to the man.

Q. Well, have you at any time talked with anybody, who purported to know the condition of these cars, about the condition of these cars?

A. Yes, sir; of course. I afterwards heard that the draw-bolt—no, the—I forget what the name of it is——

Q. Draw-bars. Anything about the brakes—how the brakes were?

A. No, sir. The first I heard about the brakes was, I think, this morning, in court.

Q. In your conversation, at any time, with men who purported to know the condition of these cars, did you talk about the condition of the brakes?

A. No, sir.

Q. Did you talk about the position of this brake?

A. Did I talk?

Q. Anybody to you, or in your presence or hearing, about the position the man was standing, or the position he was in, when the accident occurred?

A. Yes; I have heard men talk of the position he was in, at the time the accident occurred. I have heard them say he was putting on the brake.

Q. When they say he was putting on the brake, did they describe how they put on that kind of a brake—the kind of a brake that was on that car?

A. One leg was supposed to be down between the cars.

23 Q. Was that talked of—that one leg was supposed to be down between the cars?

A. I suppose so; can't put on a short-handled brake without.

Q. From what you heard you formed an opinion that they couldn't put on the brake without putting the foot down between the cars, did you?

A. Yes, sir.

Q. Have you that opinion still?

A. I have no definite opinion; I think so. I think a man can't put on the brake very well without putting his foot down there.

Q. Then you have formed an opinion, and have that opinion now,

that it was necessary for a man to set his foot down between the cars to set that brake—a brake of that description?

A. Yes, sir; that's what it was.

Q. From what you heard and know of the case, did you form any opinion as to the negligence of the company in having cars in that condition?

A. Well, I couldn't say as I did myself. I couldn't say that I did form any opinion.

Q. Knowing the condition of the cars from the statement these parties made to you, and you saw them there yourself, did you form any opinion about the duty of the railroad company in moving those cars backward and forward in the yard?

A. No, sir; I did not. For I never worked an hour on the road in my life.

Q. I am not asking about an opinion you might have formed by reason of having worked on the road. On the statement you heard from these parties, who purported to know the condition of the car, did you form any opinion in regard to the duty of the company in moving these cars about in the yard or otherwise?

A. Not that I remember.

24 Q. Have you any opinion now as to what the duties of the company would be in regard to moving those cars, assuming that they were in bad condition?

A. Well, I learned more about it to-day than I ever knew before. I have no opinion except what I learned to-day, from hearing other parties tell how they ought to be moved.

Q. From what you learned to-day have you an opinion—have you an opinion as to the duty of the railroad—as to how these cars should be moved about the yard?

A. Yes, sir; I have.

Q. Have you an opinion, from what you know of this case, in regard to the notice the company ought to have given to the plaintiff when they removed these cars about the yard?

A. I have no ideas what the rules or regulations are.

Q. I am not asking anything about rules or regulations. Have you an opinion in your own mind, you individually, as to whether they should notify them or not?

A. Well, I suppose they should.

Q. I am not asking whether you supposed they should. I am asking if you have an opinion; if you suppose they should you must necessarily have an opinion.

A. Well, I suppose they had a right——

Q. Just answer my question. Have you an opinion on the subject—on that question?

A. I don't know as I have a candid, downright opinion.

Q. Have you any opinion?

A. Yes, sir.

Q. Have you formed an opinion that, if it was conceded that these cars were in a disabled condition, the draw-bar and dead-wood was gone, that it would be negligence or not for the company to move

those cars about the yard without notifying the plaintiff, who was a brakeman in the yard?

(Objected to, as immaterial, improper, and incompetent, and objection overruled by the court, to which ruling the plaintiff excepts.)

Q. From what you know of the case, have you formed an
25 opinion as to whether it would be negligence for the company to move these cars without notifying the plaintiff, knowing the condition they were in?

A. Yes; I suppose I have.

Q. You have that opinion now, have you?

A. Yes, sir.

Q. Would it require evidence to change that opinion—I am not asking you which way it is—would it require evidence to change that opinion?

A. Yes, sir.

Q. Have you talked with anybody, who purported to know the facts, in regard to the condition of these brakes on these cars?

A. No, sir.

Q. Have you talked with the plaintiff, Mr. Herbert, about this case?

A. Yes, sir; I guess I have; some time afterwards, when he got around; I wasn't acquainted with him at the time.

Q. Did he state to you how the injury occurred?

A. I don't think he did.

Q. Did he state anything in regard to his injury—how it occurred?

A. No, sir; I made some little remark; he had had bad luck, or something like that.

Q. Have you had any talk with any person about being a juror on this case?

A. No, sir; not that I can remember.

Q. You would remember if you had had, wouldn't you?

A. Yes, sir; I think so.

Q. Since you have been on this panel have you talked with the jurors or heard other jurors discussing this case?

A. Yes, sir; I heard them talk about it going down to dinner, that it seemed pretty hard to get enough jurors—something like that.

Q. Did they say anything about the merits of the case?

A. No, sir.

26 Q. Was there anything said about the amount of damages?

A. No, sir; not that I remember.

Q. Have you any opinion as to the amount of damages a man ought to recover for an injury such as this plaintiff received?

A. No, sir; I don't know what it's worth to be damaged in that way.

Q. Have no opinion?

A. No, sir.

Q. It being admitted that these cars were in bad condition—that the draw-bars and dead-woods were gone—have you an opinion on

the question of whether that was negligence on the part of the company?

A. I don't know as it was negligence of them, their being broken; I suppose they are liable to be broken at any time.

Q. Well, to move the cars while they were broken?

A. I suppose it would have been.

Q. I am asking you for your opinion?

A. Yes.

Q. You have an opinion?

Q. Have you an unqualified opinion on that question, that it would or would not be negligence on the part of the company to move these cars in the condition they were in?

A. Yes; I guess I have.

Q. Have you an unqualified opinion on the question that it would be negligence for the company to move the cars without notifying Mr. Herbert of the bad condition they were in?

A. Yes, sir.

Q. Would it take evidence to change your opinion on either of those two propositions?

A. Yes, sir; I think it would.

The defendant rests the challenge under the sixth subdivision of section 244 of the Civil Code.

27 Q. Have you an unqualified opinion or belief as to the merits of this action?

A. No; I think I have not.

Q. Do you pretend to have any knowledge of the material facts of this case?

A. What does that mean, sir?

Q. Well, the facts which govern the rights of the parties—of the plaintiff to recover or the defendant to succeed in its defence; do you pretend to have a knowledge of those material facts?

A. Not until I hear the evidence.

Q. Have you formed an opinion that you know the facts, such as should govern the rights of the parties in this case at this time, before you hear the evidence?

A. No.

Q. You don't claim that?

A. I don't claim that.

Q. Have you any opinion whatever that would govern your conduct as a juror in this case now, before you hear any evidence?

A. I don't think I have an opinion as strong as that.

Q. Would you, in passing upon this case as a juror, or would you not, be governed solely and only by the evidence offered you here on the jury, and by the statement of the law given by his honor from the bench?

A. I would be governed by the law and evidence.

Q. Would you be governed solely by that?

A. Yes, sir.

Q. Now, a number of questions have been asked you about opin-

ions; you have certain opinions, I suppose, as to what railroad companies should do to keep from injuring their employés?

A. Yes, sir; certainly; opinions more from what I learned to-day than anything else.

28 Q. What you learned to-day was what you heard in the court-room?

A. Yes, sir.

Q. Examining these jurors?

A. Yes, sir.

Q. You say before that you hadn't any opinion?

A. Well, I never worked on the road; never knew anything about railroading.

Q. These opinions you talk about are what you have learned sitting right here?

A. Yes, sir.

Q. Have you any opinion of that kind that would at all effect your arriving at a conclusion based on the evidence offered in court?

A. No, sir; I don't think I have.

Q. Now, the counsel asks you if you have an opinion that you couldn't set the break without setting your foot down there on one of these short brakes?

A. That was what it was represented to me.

Q. As far as you understand that brake, you have to set your foot down?

A. It's this step brake?

Q. The brake is down a foot or more below the top of the car.

A. On the end of the car?

Q. If the evidence in this case showed that you didn't have to put your foot down which would you believe?

A. If the evidence showed, of course, I would believe the evidence. It is merely rumors I have heard about that.

Q. Counsel again asks you, have you an opinion as to whether it would be negligence on the part of defendant—that is, the railroad company—to move its disabled cars without notifying the plaintiff; have you any opinion whatever touching the law of this case that would affect your taking the law from the court as the court gave it to you?

A. No, sir.

29 Q. None whatever?

A. No, sir; none whatever.

Q. You stated, I think, you had some opinion as to whether they should or should not move disabled cars. Let me ask you whether, in your opinion, that would not be governed by circumstances that you haven't heard. For instance, supposing they were moving the car for the purpose of getting it to the shop. Do you think that would make any difference from their taking and moving it off on the road loaded?

A. I should think it would.

Q. Do you know any of the circumstances in this case? What they were doing with this car; where they were taking it—anything of that kind?

A. I don't know where they were taking it.
Q. You don't know?
A. No, sir.
Q. Then, have you any unqualified opinion as to whether the moving at that time was or was not negligence—have you any unqualified opinion as to whether the moving of that car at that time was or was not negligence on the part of the company?
A. Nothing more than what I have heard to-day.
Q. Have you an unqualified opinion as to whether it was or was not? Did you learn to-day where they were moving that car—where to, or anything about that?
A. Heard they were switching it; that's all.
Q. You talked to the plaintiff. I believe you stated to him that he had bad luck?
A. I stated to him he had had bad luck; I asked him how he was getting along; I was introduced to him shortly after it occurred.
Q. Was that the extent of the conversation?
A. I think it was at that time?
Q. Since that time have you had any conversation with him?
A. Yes, sir; I talked with him since he came back from
30 Fargo; this time he said his case was coming off this term of court.
Q. Nothing said about the facts or merits of the case—anything of the kind?
A. No, sir.

Cross-examination by attorney for defendant:

Q. You say you have had some talk since he came back this time?
A. Why, yes.
Q. Did he state anything to you about being a juror on the regular panel?
A. I don't remember that he did.
Q. Was there anything said by him in your presence and hearing about who the jurors were?
A. About my being a juror?
Q. Yes.
A. Not that I remember.
Q. You had no talk with him about your being a juror?
A. No; he was in here and seen that I was, suppose.
Q. I am asking you if you had any talk with him?
A. No, sir.
Q. Now, you have talked with persons who purported to know the facts—the condition of these cars—you state, I believe?
A. Yes, sir; at that time; shortly afterwards.

(Challenge overruled by the court, and to this ruling defendant excepts.)

31 D. O. BOSTWICK, being called as a juror, and first duly sworn to true answers make touching his competency to sit as a juror

in this case, is examined as follows by G. P. FLANNERY, counsel for defendant:

Q. Mr. Bostwick, you know the nature of this case, do you?
A. Yes, sir; I have heard something about it to-day.
Q. Is this the first time you ever heard of the case—to-day?
A. It is the first time.
Q. Was you here at the time the accident occurred?
A. I don't think I was. If I remember right, I was in Deadwood at the time. I was in the Black Hills.
Q. Have you ever talked with anybody who purported to know the facts in the case?
A. No, sir; I have not.
Q. Did you and Mr. Goff and some other jurors have a talk about this case the other day, and about the amount of damages that ought to be awarded?
A. I don't remember that we did, sir.
Q. Do you remember that you didn't?
A. I do not. As to the amount of damages, I didn't have——
Q. Did you have a talk about the case?
A. I don't remember that we did. I am under the impression that we did not. It might have been mentioned incidentally. I am not certain as to whether we have or not.
Q. Have you any opinion, one way or the other, as to the amount of damages that ought to be given for an injury of this kind?
A. No, sir; I can't say that I have.
Q. Have you talked with anybody regarding this case?
A. No, sir; nothing more than perhaps incidentally mentioning it.
Q. Have you formed or expressed an opinion as to whether
32 the railroad company is liable for damages for injuries of this kind?
A. No, sir; I have not.
Q. Well, refresh your mind. Didn't you talk with Mr. Wetherby a day or two ago?
A. Yes, sir.
Q. Wasn't it upon opinion?
A. I didn't express any opinion. I will state what I said to Mr. Wetherby.
Q. Yes, state it.
A. I said I had been under the impression than an employé of the railroad company couldn't get damages if they were hurt while in the employ of the company.
Q. Then you have expressed an opinion on that, have you?
A. I said I had supposed such was the case—if it's an opinion; that I had supposed it was.
Q. It was a talk with Mr. Wetherby here a day or two ago?
A. Yes, sir.
Q. Have you ever talked with anybody else about the case?
A. No; not as much as that.
Q. Well, not as much as that; at all?
A. Well, I say the case may have been, perhaps, incidentally men-

tioned, like asking, "When is the railroad case coming on;" something of that kind.

Q. Was you present when a discussion took place between Mr. Goff and other jurors in reference to the amount of damages that ought to be awarded?

A. I don't think I was; if I was I have entirely forgotten it.

Q. You did express an opinion to Mr. Wetherby as to the liability of the company, did you?

A. I think I used the words I have repeated.

Q. Anybody said anything to you about being a juror on this case?

33 A. No, sir.

Q. Nobody asked you if you was to be a juror?

A. Why, no; perhaps one of the jurors would say to another, "You will be called next," or something like that.

(Defendant rests his challenge under the sixth subdivision of section 244 of the Civil Code, and challenge denied by the court, to which ruling defendant excepts.)

C. S. WEAVER, being called as a juror, and first duly sworn to true answers make touching his competency to sit as a juror in this case, is examined as follows by plaintiff's counsel:

Q. Mr. Weaver, where do you live?

A. In Bismarck.

Q. What is your business?

A. I am a lumber dealer.

Q. How long have you been a lumber dealer?

A. Something over five years here.

Q. You ship your lumber over the Northern Pacific road?

A. Yes, sir.

Q. Where is your lumber yard?

A. It's lying on the track—just west.

Q. Your office on the track—on the right of way?

A. Yes, sir.

Q. From whom did you rent that right of way?

A. We didn't rent it.

Q. From whom did you get it?

A. The railroad management allowed us to go in there and hold it until needed for other purposes of more value.

Q. In other words, they gave you a place for your office and for your lumber yard without any cost until they see fit to quit it; you are there, then, a kind of tenant at will without rent?

34 A. Yes, sir.

Q. Do you know anything of this case; did you hear of the occurrence when it happened?

A. Being more or less acquainted with all the yard boys—have to call on them every day, sometimes several times a day—of course we would hear of such an accident.

Q. Did you talk to any of them about it?

A. I asked in regard to the accident; was told or heard that one had taken place; I think I asked the yard-master how it occurred.

Q. He explained to you how it occurred?

A. Yes, sir.

Q. Explained to you the circumstances?

A. Yes, sir; probably told me in two minutes all that occurred in regard to it.

Q. Told you the reason of the accident, how it occurred, etc.?

A. Yes, sir; simply said the bad condition of the cars; that was all.

Q. Did you have any more particular explanation of that?

A. No, sir; I think I saw the cars where they were being repaired, right opposite my office.

Q. Went and looked at them yourself?

A. Not particularly, any more than I saw the cars standing there.

Q. From what you heard at that time did you form or express an opinion as to whether the company was guilty of negligence, or whether the negligence of the company, or anything done or left undone by the company, had caused this injury to the plaintiff? I don't ask you what the opinion was. Did you form or express an opinion on that matter?

A. I never thought of the occurrence until this came up to-day.

Q. At the time this yard-master explained to you?

A. I simply heard it, and it passed out of my mind.

Q. When he told you how it occurred, didn't your mind
35 come to any conclusion as to whether there was or was not blame?

A. I didn't think of it; I felt simply sympathy for the man as being hurt.

Q. You didn't think about the company; you thought of the man?

A. I didn't think—I thought of the man. I don't think there is any one here but what would feel sympathy for a young man like him getting maimed for life.

Q. But you didn't think whether the company was to blame or not?

A. No, sir; I did not.

Cross-examination by defendant's attorney:

Q. Mr. Weaver, don't you rent your office—isn't your office in a building owned by somebody else—isn't it in a building owned by Mr. Raymond?

A. The part of the building in which my office is is owned by C. S. Weaver & Co.

Q. You have no arrangement with the railroad company in regard to that building, have you?

A. No, sir; none whatever with the railroad company. Mr. Raymond and C. S. Weaver & Co. built the building the office is in, in partnership, when it was built.

Q. You simply dump your lumber off on the right of way, the same as any other dealer does?

A. Yes, sir.

Q. Your office arrangement is with Mr. Raymond, and not with the company?

A. Yes, sir. Mr. Raymond obtained permission to put that building at that point. At the time the building was put there, there was quite a discussion as to where we should put our yard. We was offered a position across the track, where the railroad car shop now is. We chose to go in with Mr. Raymond on this side as long as the railroad would allow us to retain it.

36 Q. Never made any lease or paid the railroad anything for the use of the ground?

A. No, sir.

Redirect examination:

Q. Your company and Mr. Raymond put up this building together?

A. No, sir; they permitted Mr. Raymond to put up the building.

Q. Didn't you put up part of that building under Mr. Raymond's arrangement—didn't you put up part of that building?

A. Yes, sir.

Q. Didn't you put it up with the understanding that you could keep it there just as long as the company pleased, and when they didn't please you would have to get it off?

A. Yes, sir.

Recross-examination by defendant:

Q. Who was that understanding had with, the railroad company or Mr. Raymond?

A. It was through Mr. Raymond.

Q. You and Mr. Raymond?

A. Yes, sir.

Q. You and the railroad company had no arrangement?

A. No, sir.

Redirect examination by plaintiff:

Q. As to your lumber yard, that is on the railroad ground?

A. Yes, sir.

Q. And subject to this understanding, that you can keep it there so long as the railroad company wishes, and no longer?

A. Yes, sir.

By the COURT: Q. Who made the arrangement with the railroad company as regards the lumber yard?

37 A. I made the agreement with the station agent here.

Q. With railroad company?

A. Yes, sir.

Recross-examination by defendant:

Q. In using this ground for a lumber yard, is it a place where it is the usual custom, all along the line of the road, to unload lumber—handle it there?

A. It is, so far as I know.

Q. Have you made any lease, or agreed to pay any rent or any compensation whatever?

A. I hever had.

Juror challenged by the plaintiff, and allowed by the court; to which ruling the defendant excepts.

WILLIAM FRANKLIN, being called as a juror, and first duly sworn to true answers make touching his competency to sit as a juror in this case, testifies as follows:

Examination by attorney for plaintiff:

Q. Mr. Franklin, where do you live?

A. Here in this city.

Q. How long have you lived here?

A. Been here a little over three years now, steady; been here eight years off and on.

Q. Do you know the suit we are preparing to try?

A. Yes, sir.

Q. Have yon any opinion about the merits of that case any way? I don't ask you what the opinion is. Have you formed an opinion as to the merits of the case from the facts?

38 A. I have not formed any decided opinion of any kind; might have now and again formed an opinion of some kind, no decided opinion.

Q. You have no decided opinion?

A. No, sir.

Q. Have you any opinion, any unqualified opinion, as to the merits of the action?

A. No, sir; I have not.

Q. You are sure of that?

A. Yes, sir.

Q. You do live here now?

A. Yes, sir.

Q. Have you any knowledge of the material facts of the case?

A. Nothing, only that I heard it around in my place of business that there was a man hurt. Never knew the man till, I guess, two months afterwards, to see him. I spoke to the man.

Q. That's all?

A. That's all. I spoke to him 20 times, perhaps, for that matter.

Cross-examination by attorney for defendant:

Q. You were in business here at the time of this accident, were you, Mr. Franklin?

A. Yes, sir.

Q. Have you talked with anybody that purported to know the circumstances and facts at the time of the occurrence?

A. I don't think that I ever heard the particulars in this case.

Q. Have you talked with anybody that knew any of the facts?

A. To tell the truth about it, I have heard more about it since I have been here.

Q. Of course I want you to tell the truth, but I want an
39 answer to my question; have you talked with anybody who purported to know any of the facts in the case?

A. No, I don't think I have—just saying like this, who was hurt and how he came to get hurt.

Q. Then you have talked with somebody that purported to know that he was hurt and how he came to get hurt?

A. Yes, sir.

Q. Wasn't that talking about the facts?

A. Come to think, I guess it was.

Q. Did you talk with more than one person?

A. I don't remember.

Q. Have you talked with several?

A. Yes, sir; I have.

Q. Wasn't it talked generally?

A. Yes, sir; twenty people that I have heard talk about it or talked with about it myself.

Q. Did you see the cars on which he was injured?

A. No, sir; I never saw them—never saw one of them.

Q. You didn't go over there at the time of the injury?

A. No, sir; I didn't.

Q. These people who talked with you, that you talked with, purport to give a statement of the fects—the condition of the cars and how he was hurt by them?

A. Nothing more than only he was hurt. Well, they said he was hurt by switching in the yard.

Q. Tell how the cars were.

A. I didn't hear any of the particulars about the cars at all.

Q. Did they say how he was hurt?

A. Yes; they said he was jammed in between two cars and the bumper was broken off.

Q. They said something about the condition of the cars?

A. Just that way. I have heard that 20 times, probably, that way—only that way.

Q. Have you had any talk with anybody about being a juror in this case?

40 A. No, sir.

Q. Since you have been on this panel have you talked with anybody about the amount of damages that ought to be awarded in this case?

A. No, sir; I haye not.

Q. From the talk—the conversation you had—did you form any opinion?

A. I don't think I have ever.

Q. Do you know?

A. No, sir; I don't believe I have. I might have thought——

Q. When you talked backwards and forwards with these 20 persons you had no opinion on the subject?

A. I wouldn't say I didn't. I might have had once. It was about he was hurt—he ought to have something for it. Then again, per-

haps, I couldn't form any decided opinion on anything I didn't know anything about.

Q. I don't ask you whether you have formed any decided opinion. You say you have talked at various times with persons who purported to know the facts about this injury—that the cars were in a disabled condition?

A. I don't know these people claimed to know the facts.

Q. During the time, or at any time, while you was talking with any of these persons, did you have any opinion about the case?

A. Well, I guess I must have had. It is some time ago now; I don't recollect what opinion I had at the time.

Q. Have you any opinion as to whether or not a railroad company ought to pay for injuries occasioned in that way?

A. Well, perhaps, if I knew the particulars of the thing I might have an opinion.

Q. I am asking you a very simple question, Mr. Franklin, you can answer it, I think. Have you any opinion as to whether a railroad company ought to pay for damages occasioned in that way?

A. No, sir; I don't think I have.

Q. You have no opinion?

41 A. No, sir.

Q. Have you any opinion in regard to railroads moving cars in that disabled condition?

A. It's something I don't know anything about—railroading.

Q. I am not asking you whether you know anything about it. I am asking you whether or not you have an opinion.

A. No, sir; I have not.

Q. You did have an opinion at one time when you talked with these different parties?

A. Just as I stated. I must have had some opinion, A man can't very well hear anything without forming an opinion.

Q. Do you have that opinion still?

A. No, sir; I have not.

Q. When did it leave you?

A. I don't know.

Q. You have the same general knowledge, have you, now, since you have thought that matter over, that you have talked and heard about the condition of these cars?

A. Yes; I have heard it. I don't know anything about it except what I have heard.

Q. From persons who purported to know the facts?

A. Just merely talked about in my place of business.

Q. Were these people describing the condition of the cars—how the accident occurred?

A. I have never heard a description of the cars.

Q. You stated a moment ago you heard some of the dead-woods were gone.

A. No, sir; I never stated anything of the kind; I said I heard the bumper of the car was gone; that's all I ever said. I don't know what the dead-wood of a car is.

Q. You say the dead-wood. You heard them say the dead-wood, or bumper, rather, was gone?

A. The bumper. I never heard about such a thing as the dead-wood of the cars.

42 Q. You heard that his foot was down between the cars, did you?

A. Yes, sir; that's the way I heard.

Q. Did you hear it was necesssary for him to get his foot down there to set the brake?

A. No, sir.

Q. Did you hear he was braking when his foot was injured?

A. Yes, sir. I heard that he was working in the yard for Mr. Gilboy.

Q. I ask you if you heard he was setting the brake?

A. Yes, sir. I heard he was working there setting the brake on the car.

Q. Have you an opinion on the case now, from the facts you know?

A. No, sir.

Q. When did you cease to have that opinion which you formed at the time?

A. That's a very difficult question for me to answer, when that opinion left me, because I stated that I never had an opinion—a decided opinion.

Q. I am not asking you, now, if you had a decided opinion—an opinion of any kind?

A. If a person would speak to me I would form an opinion at the time, perhaps. Perhaps five minutes afterwards I wouldn't think anything more about it.

Q. You recollect the facts that were stated to you, now, don't you?

A. I couldn't repeat any of them. I recollect that there was some stated to me about this accident, certainly, dozens of times.

Q. It was on that statement of what purported to be the facts you formed the opinion?

A. Yes, sir; it was.

Q. You still recollect those facts as stated to you at that time?

43 A. I do not recolled the facts as stated to me at that time.

Q. You recollect the facts stated to you?

A Yes, sir; I recollect some of the facts stated to me.

Q. You formed an opinion on that statement of facts at that time?

A. I certainly must have had; I could not say that for certain whether I formed any opinion, either one way or the other.

Q. Then you talked with 20 different persons about these facts—as much as 20 different persons—and formed no opinion?

A. I haven't talked with 20 different people about the facts; I have talked, and heard 20 different people speak of it.

Q. Yes; and formed no opinon?

A. As I said before, I could not say whether I had formed an opinion one way or other; I might have.

Q. You don't know whether you formed an opinion or not?

A. No, sir, I don't; because I couldn't answer when it left me.

Q. You stated a few moments ago you must have formed an opinion?

A. Yes, sir; any man must, I guess, if he has talked about it.

Q. Then you have changed your mind; now you don't know whether you did or not. Must you have formed an opinion, or don't you know whether you did or not?

A. Yes, sir; I think I must have formed an opinon.

Q. Now, you know the same facts now; have you the same opinion now in regard to this case?

A. No, sir; I don't think I have.

Q. Now, when did you cease to have that opinion?

A. Well, that I could not tell—when I ceased to have it. I don't understand, Mr. Flannery, exactly the question, and
44 that's the reason I couldn't answer it; if I knew when anything left my mind——

Q. The facts haven't left your mind?

A. I can't state when the opinion left my mind; the day or date.

Q. You say you remember the facts now that were stated to you?

A. I remember; yes, sir.

Q. And you formed an opinion at the time on that statement of facts?

A. I didn't say I formed an opinion, nor won't say so, now or any other time. I say I must have formed opinions, as any other man would, when anybody talks to him, for the time being.

Q. Knowing those facts now, must you not have that opinion still?

A. Likely I have them.

Q. Have you or have you not?

A. I don't know of any opinion I have got in regard to the case, one way or other.

Q. Knowing the facts—what you know—have you an opinion now still upon the case, knowing these facts now, that were stated to you soon after, in regard to this occurrence? Have you still an opinion in regard to the case?

A. No, sir; I have not.

Q. When did you cease to have the opinion?

A. Well, sir, that's a question that I can't answer, nor wont, because I don't think a man in the house can answer the question, if he has had an opinion a year ago, when that opinion ceased.

Q. Have you any prejudice or bias in this case?

A. No, sir; I have not.

Q. You state from statements which you heard from persons who purported to know the facts, you formed an opinion at the time in regard to the merits of this case?

A. I must have formed an opinion.

45 (Objected to, as immaterial, and having been already answered, and objections sustained.)

Q. Are you an American citizen?

A. Yes, sir.
Q. Born here—born in America?
A. Yes, sir.

(Defendant rests his challenge. Challenge denied by the court; to which ruling defendant excepts.)

Testimony.

CLAYTON D. HERBERT
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

CLAYTON D. HERBERT, being called on the part of the plaintiff and first duly sworn, testifies as follows:

Q. Mr. Herbert, where do you live?
A. I live in Fargo.
Q. How long have you lived there?
A. Been there about three years, off and on.
Q. Did you live here prior to that time?
A. No, sir.
Q. Never lived here?
A. No, sir.
Q. Were you ever in the employ of the Northern Pacific Railroad Company?
A. Yes, sir.
46 Q. When?
A. Two years ago. I was in the employ two years nearly.
Q. Nearly two years?
A. Yes, sir.
Q. Where?
A. On this division and on the Minnesota division.
Q. In what capacity?
A. I was employed on this division as brakeman; on the Minnesota division as locomotive fireman.
Q. How long was you on the Minnesota division?
A. I should judge half a year on this division first.
Q. You were here as brakeman?
A. Yes, sir.
Q. How long had you been on this division?
A. About a year and a half.
Q. That is, running between this point and Fargo?
A. Yes, sir.
Q. You remember the time of this accident by which you lost your leg?
A. Yes, sir.
Q. Where were you at work then, and in what capacity?
A. I was braking here in the yard.
Q. How long had you been engaged in braking in the yard?
A. I got hurt on the second day.
Q. I suppose all the jury understand—perhaps they may not understand—what you mean by braking in the yard?

A. Well, I was brakeman.

Q. What was the nature of your duties?

A. To set brakes and loosen brakes and throw switches, and such things as that.

Q. Now, in the yard, cars are being moved from one track on to another track, back and forth; are they or are they not?

A. Yes, sir.

Q. And was it or was it not your duties to go on to the cars as they were moving?

A. Yes, sir.

47 Q. Under whom was you made—who was present that gave you orders?

A. Ed. Gilboy.

Q. He was your yard-master?

A. Yes, sir.

Q. State how orders are given in the yard; whether it's by word of mouth, or whether by signs.

A. Sometimes by mouth, sometimes by signs.

Q. Explain to the jury how those signs are made when you are off at a distance.

A. If he wanted me to stop a car he would give me a signal like that (moving hands up and down).

Q. Have they any signal to indicate that you are to turn the brake?

A. Yes, sir.

A. What is that?

A. (Witness gives signal, twisting hand round in a circle.)

Q. When cars are being switched from one track to another—trains made up—do they ever take with the engine and give them what they call a "kick"?

A. Yes, sir.

Q. Explain to the jury what you mean by that.

A. After you cut off the cars from the engine, the engineer would give the engine steam and give them a kick; then they would be cut off; then reverse the engine and stop her there; the cars would go on.

Q. And he would go off pulling some other cars?

A. Yes, sir; the other way or stop.

Q. Were there more switchmen than yourself and the yard-master?

A. No, sir; only Gilboy and I.

Q. Gilboy and you were the only two?

A. Yes, sir.

Q. Now, who usually cut the cars off from the engine—who usually did that—you or he?

A. Sometimes I would do it, sometimes he; sometimes the brakeman and sometime the yard-master.

48 Q. Whichever would do it was he directed?

A. Yes, sir.

Q. If he directed you to do it you did it, or otherwise?

A. Yes, sir.

Q. Now, when a car, or two cars, or three cars would be on the track running along, then it would become the duty of the switchman sometimes to stop them, or ascend those cars when they were running?

A. Yes, sir.

A. How is that; here a car is given a kick running on the track; is it the duty of the switchmen to ascend such cars in motion?

A. Yes, sir.

Q. Is that or is it not the usual custom, and well understood?

A. Yes, sir; the usual custom.

Q. What is the necessity for doing that?

A. Why, you have got to set the brakes to stop them.

Q. What do you want to stop them for usually?

A. Sometimes have to be stopped before they strike other cars, or to stop them at a certain spot.

Q. If there are other cars on the track ahead of them it would be necessary to stop them to prevent a collision?

A. Yes, sir.

Q. If you wanted them at a certain point you stopped them there?

A. Yes, sir.

Q. How old are you?

A. Twenty-six years old.

Q. This accident occurred a year ago last July?

A. A year ago last October.

Q. Go on and explain to us what was done at this time—how this accident occurred. Just explain how it happened.

A. I was working in the yard here at Bismarck. We was down to the river, Ed. Gilboy and I. The transfer boat had got stuck in the river, on a sand-bar. There was a lot of passengers there,
49 and she could not get across; and they had a train running from Mandan over here. They couldn't get it over, so we had to fetch the passengers up in a box car as they brought them off the boat with a skiff. So we came up with the passengers in a box car—up to the depot; Gilboy was with me. I unloaded the passengers.

Q. Who was Gilboy?

A. The yard-master.

Q. Who else was with you?

A. Harry Hoffacker, the engineer.

Q. Hoffacker, the engineer, and yourself; was anybody else with you?

A. No, sir.

Q. You three came up together?

A. There was the fireman on the engine, t

Q. Do you know who he was?

A. Yes, sir.

Q. Who?

A. Tom Rush.

Q. Where is he now?

A. I don't know where he is.

Q. In the employ of the company?
A. I believe he is.
Q. You don't know where he is?
A. No, sir.
Q. Besides you four—the fireman, engineer, yard-master, and yourself—was there any other person on that engine at that time?
A. No, sir.
Q. Now, you say you came up and unloaded the passengers?
A. Yes, sir.
Q. Where?
A. Well, we got aboard. There was some women in the car.
Q. Where did you unload them?
A. Right there, at the depot, close to the house.
Q. The hotel?
50 A. Yes, sir; about half-way between the house and the freight depot. I should judge somewheres along there.
Q. At whose request did you unload them?
A. Gilboy's.
Q. That is the yard-master?
A. Yes, sir; he started off—Gilboy did—for the numbers of the train.
Q. Started off where?
A. I don't know where he went. He went towards the depot.
Q. Did he say what he was going for?
A. Yes, sir; he said he was going for the numbers of the train.
Q. Told you to unload the passengers?
A. Yes, sir; I unloaded the passengers.
Q. The numbers of what train?
A. That was this freight train that came in, standing on the track.
Q. Then, when you came up from the river with the passengers there was a freight train standing on the track?
A. Yes, sir.
Q. And it was for the numbers of that train that he went?
A. Yes, sir. He says, "You get the engine around and we will switch the train."
Q. What train did he mean?
A. That freight train. So I got the engine around and coupled it onto the caboose; set the caboose out on the south side on the caboose track. They have a track to put them on.
Q. The engine you took around was the switch-engine in the yard?
A. Yes, sir.
Q. That was used for the purpose of distributing cars?
A. Yes, sir.
Q. This caboose you first took hold of was the caboose fastened to the freight train standing in the yard?
A. Yes, sir; I set the caboose out and brought the engine
51 back and coupled onto the freight train. I got up on the freight train and told the engineer to back up over the switch.

He backed up over the switch. I got off at the switch. Gilboy was on the hind end of the train.

Q. Gilboy was on the hind end of the train. That would be the front end of the train as it came in?

A. I was on the east end. He was on the west end. He got off at the switch. I got off before he got off. I says, "Ed., will I throw the switch and ride them in, or will I cut them off?" He says, "Dick, cut off two cars and ride them down below the lower crossing." I cut off two cars and rode them down below the lower crossing.

Q. What you mean by cutting the cars off, or cutting the cars and riding them down was, after they got this kick——

A. He pulled the train back over the switch. I went in between the second and third cars, pulled the pin, and got up on top of them. The engineer gave them a push, so that they went clear below the lower crossing, and I rode them clear down below the lower crossing and stopped them where he told me to.

Q. Where was that crossing from where he told you to stop them?

A. Thirty-five or forty rods, I should judge. Then I stopped them and started back. He kicked in some more cars; he motioned for me to catch them.

Q. He kicked in some more cars?

A. Yes, sir; on another track.

Q. While you was down with those first two, Herbert, do you know [how] many he had cut off, or on how many different tracks he had switched?

A. No, sir; I don't.

Q. When you turned around to come back he had cut off two more?

A. Yes, sir. He motioned to me—like that—to catch them; as much as for me to get on top of them.

Q. Is that what the language means in your business?

A. Yes, sir.

52 Q. That means to set the brake?

A. To get on and stop them.

Q. They were coming towards you?

A. Yes, sir.

Q. Go on and explain what you did.

A. I run up and got on them, and tried to set the brake on the east car, and I couldn't. The staff was bent, and when I twisted it around it would just whirl like that. I saw then that the chain was broke.

Q. Which one?

A. The chain on the east car.

Q. That made the brake?

A. Yes, sir; the chain at the bottom.

Q. That was on the east car you did this?

A. Yes, sir; it was a brake that was on top.

Q. What was the number of that car?

A. Eighteen hundred and four. Then I couldn't set that brake

Saw the chain was broke. I stepped right down onto the other, right opposite, to set that brake up, and the dog would not hold.

Q. The brake on the first car, Mr. Herbert—the brake on the first car, you say—was on top; one of these ordinary brakes?

A. Yes, sir.

Q. You have explained about that being broken, and that you crossed onto the other car. What kind of a brake was it on that?

A. A step brake.

Q. Say that's the top of the car; the brake would be down how far—the step?

A. Twelve inches. I think it is a foot or so.

Q. Well, in order to set such a brake as that, what have you to do?

A. You have got to get your foot down there to set it.

Q. This step that's put there is for that purpose, to put your foot there?

A. Yes, sir.

53 Q. What do you do with your foot there in setting that brake?

A. Put your foot there and set it. Here's a dog that plays into the ratchet. When you turn around the brake you have to put your foot right against it; you have got to put your foot against this here dog to hold it, and turn that around.

Q. Then the brake couldn't be used or set without putting your foot down on that step?

A. No, sir; I tried to set it and could not. The dog would not hold; wouldn't hold on the ratchet. This ratchet was worn off smooth, almost, worn off so that the ratchets in there wouldn't hold.

Q. So that the brake had become perfectly worthless?

A. Yes, sir. Then the hole in the platform was worn so that the dog would tip up when I set it; would tip right out.

Q. Explain that hole in the platform.

A. This step on which you step down was a board.

Q. Of what thickness?

A. Probably an inch and a quarter.

Q. The dog is fastened to that how?

A. Bolted right through that with a small bolt—right through the dog.

Q. This place through which the bolt was was worn how?

A. Worn so that it wouldn't hold—slip right back. When you set the brake this way it would push the dog right back. Push it against the wood-work. That had worn out. I tried to set it. I couldn't; the dog wouldn't hold. I had to hold it. I held it and they struck some other cars, and the other car came right up against the top of that car and ketched my leg.

Q. The track on which these cars were being moved had on it some stationary cars below where they were moving?

A. Yes, sir.

Q. West of where they were moving?

A. Yes, sir.

Q. By the way, what track was this, Mr. Herbert, on which the cars were moving, and which you got onto?

54 A. On the second track.

Q. Is that the business track?

A. No, sir; on the next track to that. There is the house track.

Q. What is that used for?

A. Well, you put cars that belong here in Bismarck to unload—Bismarck freight. They put them on the house track there.

Q. This, that these cars were on; what is that?

A. I don't know what they call it; the next track.

Q. Is that track, as far as you know, that was used for loaded cars that were being sent down to the river?

A. We put cars on that track to take them to the river.

Q. Then have you another track you call the repair track?

A. Yes, sir.

Q. This wasn't on the repair track?

A. No, sir.

Q. Had these brakes been in order, Mr. Herbert, could you have stopped them readily before they struck the stationary cars?

A. Yes, sir.

Q. No trouble in that?

A. No, sir.

Q. What was the reason you was not able to stop until they struck these stationary cars?

A. The brakes was "no good."

Q. When you struck the stationary cars—state to the jury how you were caught there—when the cars on which you were struck the stationary car, state what occurred.

A. When I went to set the brake on the west car I put my foot on the dog, turned the brake around, set the dog; it wouldn't hold when I set it, it slipped right out again; set it again, it would tip right out.

Q. I want you to explain how you got caught there.

A. They struck these other cars right west of them; that let the east car come right up against it.

55 Q. What was the result?

A. Well, it crushed my leg so that it had to be amputated.

Q. At what place was it crushed, Mr. Herbert?

A. About two inches and a half below the knee; two and a quarter or something.

Q. State to the jury how badly it crushed it.

A. So badly it couldn't be set, and had to be amputated.

Q. You may explain whether the bones were broken; if so, whether in many pieces, or how.

A. I took them up last fall—took the bones up. I took them up. They were broken in 20 or 30 pieces, I should judge. There was just about that much of them, that was all crushed, I could not find—just jammed all together—all splintered up every way. I laid 12 days with my leg on; tried to save it; I could not.

Q. Did you do that by way of advice of anybody?

A. Yes, sir.

Q. Who?
A. Dr. Porter and others.
Q. This Dr. Porter resident here?
A. Yes, sir; I believe he is.
Q. By whose request did he call on you and wait on you?
A. I think it was Davidson or Gilboy.
Q. That is, agents of the company or representatives of the company?
A. Yes, sir; I didn't send for him.
Q. After waiting how long to try to save it?
A. Twelve days, I believe.
Q. Then they amputated it?
A. Yes, sir.
Q. Well, go on and state.
A. After they amputated it, three days afterwards, the artery burst.
Q. Now, explain whereabouts, as near as you can.
A. In my leg; right down in the stump. When they cut
56 it off they pulled it right down and sewed it up. Then, three days afterwards, the artery burst, vein came untied or something.
Q. What was the result?
A. Well, I came pretty near losing my life then. I laid there then. They went after the doctor. He came and tried to catch the artery. He couldn't do it, and I was pretty near gone.
Q. Well, how near gone?
A. Well, I don't know how near; I didn't know much about it.
Q. Did you have strength; could you hold up a hand?
A. No, sir; I couldn't raise a hand; if I went to raise it it would fall right down from the loss of blood.
Q. Had nearly bled to death?
A. I would, I suppose, if he hadn't got there pretty soon.
Q. Was that the end, or anything further?
A. Well, it never healed up until last January so that I could wear this leather.
Q. Had you to do anything more after that artery was picked up and tied?
A. Yes, sir.
Q. Well, what?
A. Well, I had to have it taken off a year ago— a piece of the bone cut off again in order to have it heal up.
Q. Where was that done?
A. In Fargo.
Q. By the way, who was present when this artery was taken up besides the doctor?
A. Well, I sent for Harry Hoffacker, the engineer.
Q. He was one of the yard men; the engineer on that train?
A. Yes, sir.
Q. Is he here?
A. Yes, sir.
Q. Still in the employ of the company?

57 A. Yes, sir; I believe he is.

Q. A year ago you had a piece more cut off. Was there any necessity for that; if so, state the necessity?

A. Well, it wouldn't heal up. The doctors advised me to have it taken off—a piece of that bone—pull the skin up over the lower part and fasten it up, thought they could heal it up that way. So we did and it helped it by doing so, and it healed up then last January.

Q. What is the effect now; do you have any pain from it?

A. Oh, yes; it bothers me whenever there is a storm, or anything of that kind. It pains me considerable in the bone and marrow.

Q. Any pains elsewhere?

A. Well, when I limp it kind of hurts me through the side.

Q. These pains are rheumatic, are they—this when storms are coming up?

A. I don't know what it is.

Q. Can you stand up—can you walk any length of time?

A. No, sir; for any length of time.

Q. Explain to the jury how this feels—how it acts.

A. That's the way it feels. It hurts me all the time, in fact. It feels as though the leg was there at times—burns and twitches and pains.

Q. Well, when you walk any length of time?

A. Then it pains me more than ever.

Q. Can you stand upon it any length of time without walking?

A. I might stand an hour or so on it.

Q. Yes; but supposing you was to attempt to stand up a day, or half a day?

A. No; I couldn't do that.

Q. Before you were hurt, when were you in the employ of the company, what else was you doing?

58 A. Before I went to work for this company?

Q. Before you went to work in the yard there.

A. I was running an engine—a portable engine.

Q. How much was you receiving?

A. Three dollars and a half per day every day in the week, Sundays and all.

Q. If you could stand to run it now, how much could you get?

A. The same man I run it for then offered to give me a fireman and build a platform around the engine, and offered me five dollars a day if I would run it.

Q. Well, could you stand it?

A. No, sir.

Q. How long had you been at work in the yard before this accident occurred?

A. That was the second day. I went to work on Thursday and got hurt Friday evening.

Q. When did you first see the freight train you was distributing when this accident occurred? Had you seen it before you come up from the river?

A. No, sir; we was down the river; we went down there with some cars.

Q. When you came back with the passengers you have described, you first saw this freight train?

A. It was standing on the track.

Q. Do you know whether these cars were loaded or unloaded?

A. I do not, sir.

Q. The two on which you were hurt.

A. I do not.

Q. Now, you may explain to the jury how these cars came to come so close together.

A. Well, sir, the dead-wood and draw-bars were pulled out.

Q. This dead-wood is what we folks call bumper?

A. No, sir; the draw-bar is what you call the bumper.
59 The dead-wood is that wood that comes out—the timber that's placed around that.

Q. You say that was drawed out on the front car—car 1804?

A. Yes, sir.

Q. So both that timber and the draw-bar was drawn out on that, you say?

A. Yes; that's what they tell me. They told me this afterwards.

Q. You didn't know of your own knowledge?

A. No, sir; not until they told me.

Q. I will ask you, as to that car 1804, whether you knew, as a matter of fact, whether the brake on it had any connection whatever with the draw-bar?

A. No, sir.

Q. And is not fastened to it in any place whatever?

A. No, sir.

Q. Would the pulling out of the draw-bar or dead-wood on that car affect the brake on that car?

A. Not a particle.

Q. You have stated to us that, until after the injury, you knew nothing about the dead-wood or draw-bar being out of the car?

Q. I will ask you, once for all, did you know anything about the defects of the brakes of either of these cars until after you went up there to try to set them?

A. No, sir; I did not.

Q. Before this accident what had your health been, Herbert?

A. Good.

Q. Has it always been good up to that time?

A. Yes, sir.

Cross-examination:

60 Q. Mr. Herbert, you say you were in the employ of this company for some two years prior to the time you went to work for them in the yard here as brakeman?

A. Yes, sir.

Q. You say most of that time you were employed as brakeman, were you?

A. Yes, sir.

Q. Was you brakeman on a freight train or passenger train?
A. On a freight train.
Q. Between Bismarck and Fargo?
A. Yes, sir; and I also was brakeman on the other division a few trips.
Q. A part of the time while you were in the employ of the company you say you were acting also as fireman?
A. Yes, sir.
Q. For what length of time did you act as fireman—what part of the two years you was in the employ of the company?
A. Probably five or six months.
Q. Then you was in the employ of the company as fireman five or six months, and about a year and a half as brakeman?
A. Yes, sir.
Q. And on a freight train?
A. Yes, sir.
Q. How long was you out of the employ of the company, running a steam thresher, before you re-engaged to the company?
A. Well, about two months, I should judge.
Q. Then, after you had been in the employ of the company for some two years, you went out of its employ for about two months, and then re-engaged to the company again?
A. Yes, sir.
61 Q. The second time you was engaged as brakeman here in the yard?
A. Yes, sir.
Q. Now, a brakeman here in the yard, as I understand it, does not go out on the trains, but remains here in the yard?
A. I was working here in the yard.
Q. You didn't go away from the yard on trains?
A. No, sir.
Q. Your business as brakeman in the yard is, when a train comes in with a great number of cars, to break up that train and distribute the various cars of which that is composed in the place on the different tracks where they are to go?
A. Yes, sir.
Q. Also to gather in cars from the different tracks and make up the trains?
A. Yes, sir.
Q. That is what you and the yard-master do?
A. Yes, sir.
Q. Your business being local here?
A. Yes, sir.
Q. Now, do accidents occur occasionally to cars in running freight trains between different leading points—say between Bismarck and Fargo? Are there accidents to cars occasionally?
A. How is that?
Q. Do accidents occur to cars, by which they are damaged, running between Fargo and Bismarck, or any other points on the railroad, occasionally?
A. Yes, sir; sometimes.

Q. And when an accident of that kind occurs to a car on the road, if it is in condition so that it can be run, kept on with the train, what is the practice—to leave it right where it is or fix it so that you can bring it into the station?

A. When there is a car with the dead-wood and draw-bar gone, we always set them out—I always do—at the first siding, or else put it behind the caboose and bring it in.

Q. If an accident of that kind occurs, and you can fasten
62 it by a chain to the train, and it's in the center of a long train of cars—an accident occurs, and you can fasten it by a chain, as you can, and there is no difficulty to bring it in, you fasten it in that way and bring it in, don't you?

A. I have helped to do such jobs as that.

Q. How long a freight train was this that came in that day that brought in this broken car?

A. I could not say.

Q. Could you tell about how many cars there were in it?

A. I could not; I don't know.

Q. You found this freight train standing on the track when you came up from the river—you and the yard-master and engineer?

A. Yes, sir.

Q. It had come in while you were down there?

A. Yes, sir.

Q. About what time in the afternoon was that freight due here?

A. Well, I don't know; I could not say.

Q. What time did you come up from the river—what time in the afternoon?

A. About 5 o'clock, I should judge.

Q. What time did you go down to the river?

A. Well, we went down there in the afternoon some time; I could not tell; somewhere about 2 or 3 o'clock.

Q. Came back, you think, about 5 o'clock?

A. Yes, sir.

Q. And the train wasn't in when you went down?

A. No, sir.

Q. When you came back it was in?

A. Yes.

Q. It had come in, then, while you were down there?

A. Yes, sir.

Q. Now, this was a freight train that had come in from the East, was it not?

A. Yes, sir.

Q. You can't tell how many cars there were in it?
63 A. No, sir.

Q. Well, was it a long train?

A. I couldn't say; I don't know how many cars.

Q. It was standing on the main track when you came up, was it?

A. I think it was.

Q. The same track it came in on?

A. I wouldn't be positive whether it was or not.

Q. Had the engine that brought it in been detached from it and taken away when you came up?

A. Yes, sir.

Q. Were there any cars on this track, on this main track, ahead of these freight cars on the way down to the river?

A. No, sir.

Q. Not any?

A. For we had just came up from there.

Q. Well, your business and that of the yard-master, as soon as the freight train comes in, the first thing you do is to go to work to break the train up and distribute the cars around on the various tracks where they belong?

A. Yes, sir.

Q. As soon as you found this train in, as a matter of course that was your business and that of the yard-master to go to work immediately and break up and distribute the cars where they belonged?

A. Yes, sir.

Q. When you saw those cars the yard-master said he would go and get the number of the cars? Before breaking the cars up it is the duty of the yard-master to get the number of the cars that are in the train, and also the contents of the cars?

A. I don't know. I never had charge of a yard. I don't know what their duties is in regard to that.

Q. Well, this being a freight train, coming in from the East, it was a loaded train, was it not?

A. I should judge it was loaded.

Q. They weren't bringing empty cars in here because there
64 was no freight here to take East—they were bringing freight from the East out West?

A. Yes, sir.

Q. Were there not on this train some cars loaded with ties?

A. I couldn't say.

Q. Well, the first thing you did after the yard-master went to get the number of the cars in the train, you went to work before he came back and attached the switch engine—you brought the switch engine up from the river when you came up?

A. Yes, sir.

Q. That is the engine you moved these cars with?

A. Yes, sir.

Q. You went to work, I suppose—you and the engineer—and attached the switch engine that you brought up from the river to the caboose, which was at the hind end of this freight train?

A. Yes, sir.

Q. That you switched off and put off on some other track, did you?

A. Yes, sir.

Q. Then, had you taken off any other cars from the main train and switched off on any other track before Mr. Gilboy, the yard-master, came out?

A. No, sir.

Q. You had switched off, however, this caboose?

A. Yes, sir; that's all. Then the yard-master, Mr. Gilboy, came out.

Q. You say you asked him whether you should uncouple the cars and he stop them, or whether you should stop them and he uncouple them?

A. Yes, sir.

Q. He told you he would uncouple them?

A. He told me to ride them in.

Q. Now, how many tracks are there here where you can switch off cars onto—how many tracks are there here?

65 A. I should judge there were about four or five.

Q. Now, how many cars were switched off, after you had taken the caboose off; then how many cars were next switched off?

A. Of that end of the train?

Q. Yes, sir; from the hind end of the train.

A. None at all, sir.

Q. Didn't you take them from the east end?

A. No, sir.

Q. You took them from the west end?

A. Yes, sir.

Q. The caboose was at the east end of it, was it not?

A. Yes, sir.

Q. Then, were the cars switched off from the west end or east end?

A. The west end.

Q. Then you moved the entire train to switch them off?

A. Yes, sir.

Q. Now, after the caboose was taken off, after Mr. Gilboy came out, how many cars were switched off the west end of the train first?

A. The engineer pulled the cars back over the switch. I got off at the switch.

Q. He moved the whole train eastward?

A. Yes, sir.

Q. Moved the train eastward until he passed the switch?

A. Yes, sir.

Q. Until the west end had passed the switch?

A. That's right.

Q. Then he started the whole train west again, did he?

A. I cut off two cars. He throwed the switch, and he told me to ride them down below the crossing.

Q. Who throwed the switch?

A. Ed. Gilboy.

Q. The yard-master threw the switch?

A. Yes, sir.

66 Q. And you cut off two cars?

A. Yes, sir.

Q. And the impetus of the train; that is, I suppose he moved the entire train against these two cars, and gave them a shove?

A. Yes, sir.

Q. And they run along on the side track?
A. Yes, sir.
Q. And you rode down with them?
A. I staid on top.
Q. Were these freight cars or loads of ties?
A. Freight cars, I believe.
Q. Are you positive about that?
A. I am pretty positive.
Q. You are as positive of that as you are of other matters; do you know what they were loaded with?
A. I do not.
Q. Were they stock cars?
A. I could not say.
Q. Were they not stock cars loaded with ties?
A. Well, I couldn't say. I didn't notice them. I didn't pay any attention to them.
Q. You rode on the top of those cars down until you got to the point where they were to be stopped?
A. Where he told me to stop them, I stopped them.
Q. How many cars were next detached from the train?
A. I couldn't say, sir.
Q. Well, where were the next cars that were detached from the train; on to what track were they switched—on the same track these two had run down on?
A. When I cut off these two cars he gave them a kick, and I rode them down. He moved the whole train east again.
Q. Then there was another lot cut off?
A. How is that?
Q. When he moved the train east again you was down on these two cars that had been sent off; then there was some more cut off?
67 A. I paid no attention; I stopped the cars there where he told me; there below the crossing.
Q. Were there some more cars afterwards cut off and sent off on another track, which you didn't go to?
A. I couldn't say, sir, whether there was or not.
Q. Do you recollect?
A. I do not.
Q. You don't recollect whether there was some more cars cut off and sent off on some other track which you didn't go to stop?
A. No, sir; I don't know.
Q. The next thing you did do was to receive a signal to stop some more cars coming down towards you?
A. Yes, sir.
Q. On the same track you had taken the first two cars down on?
A. No, sir.
Q. On what track was it, then?
A. They was on another track—on the track next to the main track.
Q. On which the train stood at first, or was it a track still further from it than the one you first went down on?

A. I think it was the next track to it; I couldn't say positively; I don't know what track they were on.

Q. Had there been sent down on this track these two cars were then going down, any cars from this train prior to these two going down?

A. Well, I couldn't say.

Q. You couldn't say?

A. No, sir; I don't think there were; they might have been.

Q. You had stopped no cars on this track prior to the two cars that were damaged, where you received the injury, then? They were the first two cars you had stopped on the track that these damaged cars were on, were they?

A. I don't understand you.

68 Q. You have stated that there were two cars switched off the end of the train and run down the track, and you rode down with them?

A. Yes, sir.

Q. They were the first two cars you stopped?

A. Yes, sir.

Q. Did you stop any other cars until you got on to these two cars where you got injured?

A. No, sir.

Q. You say these two cars on which you received the injury didn't run down on the same track you had taken the other two cars down on—the first two?

A. I think not.

Q. If these two cars that were damaged run down on a different track from the first two did, of course you hadn't run down any other cars on the track these two cars were on?

A. No, sir.

Q. Did you see any cars ahead of you on the track that these two cars went down on that were injured—any other cars on the track?

A. Were there any other cars on the track?

Q. Yes, sir, ahead of you; towards which these two cars were going?

A. Yes, sir.

Q. Well, they were cars that had been standing there, then—not cars which had been switched on to the track from this train?

A. I think they were.

Q. How many were there?

A. I don't know; indeed, sir, I couldn't say.

Q. Box cars, were they?

A. I think they were box cars.

Q. Did you take the first two cars that you took down beyond those which were standing on the track—that the next two ran against?

69 A. Yes, sir.

Q. So that you saw these other two cars standing there then, when you went down the first time?

A. Which other two cars?

Q. The two cars standing on the track, that were ran against by the next two?

A. I don't know how many there was.

Q. Well, you saw there was cars there?

A. Yes, sir.

Q. You say after you had got these first two cars you took down stopped, you had got off onto the ground and was coming back, were you, towards the main train when you saw a signal from Mr. Gilboy to stop these cars—they had been cut off and was given a shove, were they not, and coming down the track?

A. Yes, sir.

Q. Now, were there two or three cars in that line?

A. The next cars I ketched?

Q. Yes.

A. There was two cars.

Q. Only two?

A. That's all.

Q. Are you sure about that?

A. I think it was.

Q. Aren't you mistaken; weren't there three cars cut off together and sent down?

A. I think there was only two. I am pretty positive there was only two, for I got on the east end of the cars and there was only two brakes.

Q. The west end of the cars would come to you first, wouldn't it?

A. Yes, sir.

Q. You didn't get up on the cars, then, the first car you came to?

A. No, sir.

Q. You let them pass along until the hind car came up to you, and then you went up on that?

70 A. Yes, sir.

Q. Now, there might have been three cars in that bunch, might there not?

A. There was only the two cars.

Q. Only two cars?

A. Yes, sir.

Q. It was this hind car that had been damaged—that is, the draw-bar had been pulled out, was it not—car 1804?

A. Yes, sir; that's the one.

Q. You got up onto that car, did you?

A. Yes, sir.

Q. And went forward to the brake? The brakes on the two cars were both at the same end, were they not—that is, right together?

A. Yes, sir.

Q. You went forward. Did you get up on the hind end of the car or the forward end of it, as it was coming west?

A. I got up on the east end of it, on the south side.

Q. When you got up onto the car you had to travel the length of the car to get to the brake?

A. Yes, sir.

Q. There you attempted, you say, to apply the brake?

A. Yes, sir.

Q. And you found the bar of the brake, you say, was badly bent?

A. The what?

Q. The staff, or whatever you call it, what you take hold of to turn it with?

A. Yes, sir; the brake-staff.

Q. That was bent, was it?

A. Yes, sir.

Q. How much?

A. It was bent enough so that when I would turn it it would roll right around that way.

Q. It wouldn't work, then?

A. No, sir.

71 Q. You looked down to the bottom of the car to see how it looked, or what the matter was?

A. When I turned it around I saw that it was loose—turned every way; that it wound and turned around that way. I saw the end of the chain flop right out.

Q. That chain where—at the bottom of the car?

A. Yes, sir.

Q. How far apart were the two cars then; what was the distance between the car you were on and the one right in front of it?

A. About the usual distance, I should judge.

Q. You looked down to the bottom of the car and saw this chain that was attached to this brake-shaft; you saw that was loose down there?

A. I saw the end of it, when I twisted the brake around, come out. Then I knew it was no good. I stepped right over onto the other one.

Q. Well, now, would the brake work? Could you turn it so as to tighten the chain if the chain had been all right?

A. I don't know as I could have tightened it very tight. I don't know as I could have tightened it at all.

Q. On account of it's being bent so?

A. Yes, sir; when I turned it around, where it would strike where that was bent it might prevent it from going clear around.

Q. Whereabouts was that bent?

A. In the brake-shaft.

Q. Whereabouts; near the top of the car or the bottom?

A. Oh, it was down a foot or 18 inches; something like that; not very far down.

Q. From the top or bottom?

A. From the top of the car.

Q. You don't know whether the bend was sufficient so that you could not turn it clear around or not?

A. I do not.

Q. What is about the usual distance that cars are apart?

A. I should judge about two feet, or two and a half.

72 Q. You say that the chain that was attached, that would wind around the brake-shaft, you say that swung out?

A. Yes, sir.

Q. You also saw, did you not, that the two cars weren't attached in the ordinary way, but by a chain?

A. No, sir.

Q. At the same time?

A. No, sir.

Q. Now, when this header and gearing in there were pulled out there would be nothing projecting out at all from the bottom of that car, would there?

A. I believe not.

Q. Be a smooth surface right down?

A. Yes, sir.

Q. The whole surface of the car right down would be a smooth face?

A. Yes, sir.

Q. This chain that would be attached to the car would be fastened to something under the car, and then come forward and fasten into the car before it, wouldn't it?

A. Yes, sir.

Q. That's the way they fasten them that way?

A. Yes, sir.

Q. When you looked down and saw the little chain that whirls around the brake-staff wouldn't you be very apt to notice that there was something gone off from the bottom of the car, or see that chain that fastened the car to the one in front of it?

A. I didn't notice anything of that kind.

Q. When you found this brake was so bent, etc., that you couldn't turn it, and you saw it was of no use to work that, you then stepped right across onto the car next to you?

A. Yes, sir.

Q. That brake was at the hind end of the car in front of you; you didn't have to go clear forward the length of the entire car, but just simply stepped right on and took hold of another brake that was there?

73 A. Yes, sir.

Q. How fast were these cars moving at that time?

A. I couldn't say. I should judge—well, I don't know how fast—about three or four miles an hour; two or three.

Q. Now, how far did those cars have go after they were given the push before they had got down to these cars that were ahead of them on the track?

A. Oh, probably four or five car-lengths.

Q. Well, how near when you stepped from this broken car onto the other—how near had you got—how near had the cars got—down to the cars that were standing on the track ahead of them?

A. They had got pretty close.

Q. Pretty close?

A. Yes, sir.

Q. You stepped, then, across onto the other car, and that was a car that had what is called a step brake—that is, you have to step your foot down onto the step that is provided—and commenced turning that?

A. Yes, sir.

Q. You found, you say, that the dog would not catch in the cogs there?

A. No, sir.

Q. And that you had to hold it with your foot?

A. I didn't say I had to hold it with my foot. I couldn't hold it with my foot.

Q. You say you discovered that the cogs had been so worn that the dog wouldn't catch in them, did you?

A. Yes, sir.

Q. Well, when you discovered that what was you doing, if you wasn't trying to hold it with your foot?

A. I had hold of the top of the brake, holding it there.

Q. Well, your foot down on that step wasn't helping you at all to hold it?

A. I was holding my foot against the dog, and holding with the top of it. If I would take my foot away the dog would fly right out, and then the brake would go right off. I was
74 holding it with my foot against the dog, holding the top of the brake with my hands.

Q. Then, when you found that the cogs wouldn't of themselves hold the dog, you kept your foot down there on the dog to hold it in, did you?

A. Yes, sir.

Q. And intended to do that until the cars came up against the others, or until you got them stopped?

A. I was trying to stop them.

Q. I would like to know, right there, whether that dog was usually set with the foot, and whether it required the foot, or whether there was a spring or something to set it.

A. You have got to set it with your foot. You couldn't get your hand down there to hold it.

Q. There was no spring there to set it?

A. No, sir.

Q. You had to put your foot down there to set it?

A. Yes, sir.

Q. How long had you been working at that brake before the cars came against those that were in front?

A. I wasn't very long—not but an instant.

Q. Had you made a turn upon the brake?

A. Which one, the step brake?

Q. Yes, sir; after you got there to it?

A. Yes, sir.

Q. How many turns had you made—enough to tighten it up, to bring the brake's pressure on the wheels before the car struck the others?

A. I gave it a turn, and put my foot against the dog and pressed it against the ratchet; then turned the brake and set it up, and let loose of it, and it flew off; then they struck—just then.

Q. Struck just as it flew off?

A. I don't know as it was just as it flew off. I grabbed it again and tried to set it.

Q. Now, when it struck against these other cars, this coupling arrangement of car 1804 being pulled out, there being
75 nothing to intercept it, it just rolled right up against the car that you was on?

A. Yes, sir.

Q. And your foot being down there between the cars it caught your leg in the way you have described?

A. Yes, sir.

Question by JUROR: How wide was the board you are talking about?

A. How wide was the step?

Q. Yes.

A. I should judge about that wide. (A foot or a little less.)

Q. Projects that much from the car?

A. Yes, sir.

Q. Was this brake on the east or west end of the car?

A. Which brake?

Q. The brake you was trying to set.

A. On the east end of the west car.

Q. On the east end of the west car. Then it would be necessary for you to have your left foot down there to set that brake?

A. Yes, sir; I had to put my foot there in order to hold the dog there.

Cross-examination resumed:

Q. You say you noticed, too, that in this step car the hole through which the brake shaft went had been considerably worn, did you; the brake-shaft went right through this step your feet was on, didn't it—the shaft?

A. Yes, sir.

Q. You say it had been considerably worn?

A. No, sir; I didn't say that.

Q. You said something was loose about it?

A. The hole through the platform of the step brake, where the dog was bolted through onto it, was the hole that was wore.

Q. The dog that had cogs in it was loose, was it?

76 A. No, sir.

Q. The dog, then, was loose?

A. The dog was loose, rolled back when I set it.

Q. That you noticed, did you?

A. Yes, sir; when I set it it flew off; of course it wouldn't have flew off if that hadn't been that way.

Q. When you were standing there by the switch this whole train passed along east, didn't it—passed by you eastward?

A. Yes, sir.

Q. The entire train?

A. I got off at the switch, got off the train and stopped at the switch; was going to pull the pin out of the switch stand, and Ed. Gilboy got off there.

Q. While you was standing there the entire train was pulled forward east, wasn't it, so as to bring the hind car to the switch?
A. Yes, sir.
Q. The whole train then passed along in view before you?
A. Right in front of me, sir.
Q. Did you see Mr. Quinlan there, the car repairer in the yard?
A. I did not.
Q. How?
A. I did not.
Q. You didn't see him?
A. No, sir.
Q. When you and Gilboy had the talk you have mentioned about the part of the work that each should do, where was this, where were you standing?
A. At the switch stand.
Q. That was after you had switched off the caboose car?
A. Yes, sir.
Q. Now, where did Gilboy come from when you met him; how did you happen to meet; where did you come from?
A. I set the caboose out, then coupled onto the freight train, and pulled it back over the switch; Ed. Gilboy came up on the
77 hind end of the train; I got off the head of the train onto the switch; Gilboy was on the hind end of the train; rode up with the train, and got off at the switch.
Q. You were standing there at the switch, then; the train moving on eastward until the hind end of the train came there, and then Gilboy got off, he being on the hind end of the train. He got off, and you and he had the talk then you speak of?
A. Yes, sir.
Q. Which side of the train was you on?
A. The south side.
Q. That's the side next to the hotel?
A. No; the other side.
Q. That would be on the opposite side from the hotel. Which side was Gilboy on?
A. He got off on the same side.
Q. On the same side you was on?
A. Yes, sir.
Q. When you went down to the river—you and Mr. Gilboy—you took the yard switch engine down, did you, and a box car?
A. I don't remember what we took down.
Q. You took the engine down, did you?
A. Yes, sir; went down with the engine. I don't remember whether we took any cars or not.
Q. What did you go down to the river for?
A. I believe we was doing some work down at the river.
Q. Switching cars?
A. Yes, sir; something of that kind. I don't remember now.
Q. There was switching cars to be done there as well as here, was there not?

A. Yes, sir; they have got some cars down there, I believe; switching down there, I believe.

Q. All Government freight was taken down—cars were run right down to the river—cars unloaded there, were they not?

A. I am sure I don't know, sir; I never worked in the yard but two days; I don't know what they do with the cars.

78 Q. During the two days you were in their emply had their freight cars been taken down to the river?

A. Yes, sir; we had taken cars down.

Q. Distributed them there on the tracks.

A. Yes, sir; se-t them to the freight depots.

Q. Distributed them the same as here; there were company warehouses there, was there not?

A. I guess they belong to the company.

Q. There were warehouses there to which you run the cars?

A. Yes, sir.

Q. You had to make up the cars down there—get these cars together when they were to go back east again?

A. I believe we did.

Q. Your duties and Mr. Gilboy's, as yard-master, embraced the business that was to be done down there and the business here?

A. I believe they had another crew working at the river—another engine and crew at the river.

Q. You and Gilboy run the cars down there, you say, and distributed them there on the tracks, did you?

A. I think we took cars down there the day before; I couldn't say whether it was that day or the day before.

Q. What were you doing this day, when you went down, while you were there?

A. I don't remember what our business was down there that day; that was his business; that wasn't mine.

Q. You was there two or three hours; don't you remember what you was doing?

A. Was waiting there to get these passengers. She was stuck on a sand bar.

Q. Did you go down after the passengers?

A. I couldn't say.

Q. Did you switch any cars while you was there?

A. I couldn't say; I don't remember; we might have done switching there.

Q. You say you don't know the hour at which this freight
79 train was due here. Don't you know that it was late getting in that day?

A. I do not.

Q. Don't recollect?

A. No, sir.

Redirect examination:

Q. What made these cars—that is, I mean Nos. 1804 and 2280—come together so hard was striking those cars below, you not having been able to slacken the speed by the brakes?

A. That was it exactly.

Recross-examination:

Q. I don't know as I understood you, whether that brake took any hold at all or not of that dog on the cogs?

A. The dog on the ratchet?

Q. Yes; on the ratchet; did it take any hold so as to hold at all?

A. Well, a little; probably held a little more, but when I let go of it flew right off.

Q. Had you, by the work you did at that brake, succeeded in slackening the cars at all?

A. I couldn't say it slackened them but very little, if it did any.

Q. Did the brake take any hold upon the wheel?

A. I couldn't tell. It didn't work very easily; it didn't work very stiff.

Q. You couldn't tell whether it had taken any hold?

A. No, sir.

Redirect examination:

Q. You say you was but an instant at that brake?

A. That's all.

Q. What occurred there, I suppose, isn't very clear in
80 your mind ever since that time—what occurred immediately after you did that?

A. No, sir; I don't remember but very little then, because I was stunned considerably.

Q. I think you stated in your direct examination that if the brakes had been any use there would have been no difficulty in stopping those cars before they reached the stationary cars?

A. No, sir; I could have stopped them if the brakes had been good.

Q. You state that you got up at the east end of car No. 1804—at the east end?

A. Yes, sir.

Q. Where was the ladder on that car?

A. At the east end, on the south side.

Q. Wasn't the ladder at the same end as the brake?

A. No, sir.

Q. I suppose you know, but I supposed the ladder was always at the same end as the brake.

A. No, sir; not always. I have seen them with ladders on the same end—brake on the outside.

Q. Are you sure of that; that the ladder was not at the end that the brake was?

A. I am sure that the ladder was on the south side and east end, and the brake was the other end, because I run right there as soon as I got up—to the brake on the top of the car.

Q. These step brakes, are they few or often on the road?

A. Well, there are some roads has them; some has not. I have worked for roads that had them.

Q. I say, are there many of these brakes compared with others, or few?

A. There's not many on this road.
Q. On any road; are there many or few now; do you know?
A. They are going out of use altogether. They are putting them on top.
81 Q. When you went upon these two cars had you any time whatever to pay attention to looking for defects in the cars?
A. No, sir.
Q. Did it require your immediate attention to these brakes?
A. Yes, sir.

Recross-examination:

Q. Had you ever worked on any other road before you went into the employ of this company?
A. Yes, sir.
Q. On what road?
A. The Union Pacific.
Q. For how long?
A. Nine or ten months.
Q. As brakeman?
A. Yes, sir.
Q. On a train or yard?
A. On a train.
Q. And have been employed as brakeman prior to that?
A. Not until I came here.
Q. Did you ever act as brakeman in a yard prior to your commencing in this yard? Did you act as brakeman in the Fargo yard at all?
A. No, sir.

Redirect examination:

Q. Never were but these two days in a yard?
A. No, sir.

Question by juror: I don't really understand the connection between this draw-bar and dead-head or dead-wood and the bumper.

A. You don't understand it?
A. No, sir; I don't. I can't get that. I understood you to say that that dead-wood, or whatever it was, wasn't the bumper.
82 A. That the dead-wood wasn't the bumper?
Q. Yes, sir; I understood you to say so.
A. No, sir; it's not.
Q. Then do they use the bumper and that too?
A. Yes, sir; the bumper is right inside of it.
Q. Oh, it's the case of the bumper?
A. That's it. There is two pieces of timber come out this way, and the bumper is inside of that.

HARRY WATKINS, being called on the part of the plaintiff and first duly sworn, testifies as follows:

Q. Mr. Watkins, where do you live?
A. Fargo.

Q. How long have lived there?
A. About eight months.
Q. Where did you live before that time?
A. Bismarck.
Q. How long did you live here?
A. Something over a year, I guess.
Q. While you lived in Bismarck, what was your occupation?
A. Bismarck? I was switching here in the yard.
Q. Fargo? What?
A. Switching in the yard there.
Q. Are you still switching in the yard there?
A. No, sir; not now I ain't.
Q. But are you still in the employ of the company?
A. Yes, sir.
Q. Come here at their request in this case?
A. Yes, sir.
Q. Well, were you in the yard at Bismarck at the time Herbert was hurt?
A. I was at the river landing.
83 Q. That is, you were in this yard—that is, in this place, but at the river landing?
A. Yes, sir.
Q. Then you remember the day and the occasion?
A. Yes, sir.
Q. Do you remember anything about these cars we were speaking about; did you notice at that time car No. 1804 and No. 2280?
A. Yes; I did.
Q. How did you come to notice them?
A. The first I noticed them, Mr. Gilboy shoved them down to the river to me. They were loaded with Government stuff, going up to the warehouse, I presume.
Q. They were loaded with stuff for the warehouse?
A. Yes, sir; I think so.
Q. What was your duty when they was taken down?
A. He would give me the signal what track he wanted to throw them on. I would throw the switch generally.
Q. You heard the way the last witness here spoke of their signalling; that's the way it's done?
A. Yes, sir.
Q. Was there any signal given to you in regard to these two cases?
A. Yes, sir.
Q. What was it?
A. To throw the switch No. 1.
Q. Did you get onto them?
A. I did.
Q. Did you do anything on them?
A. I tried to set the brake; could not set the first one.
Q. On what one?
A. Eighteen hundred and four.
Q. Did you try the other one?

A. Yes, sir.
Q. Did you try to set that brake?
A. I went to set my foot down and I saw blood on the car, and I didn't put it in there.
84 Q. If it hadn't been for the blood on the car would you have put your leg in there?
A. Yes, sir.
Q. You tried first to set the brake on the other, and couldn't set it?
A. Yes, sir.
Q. Then stepped onto the other and tried to set this, and went to put your foot down, and on looking down saw blood and shrunk back?
A. Yes, sir.
Q. You say if you hadn't seen the blood you would have attempted to set that brake?
A. Most assuredly I would have put my foot in there.
Q. After this time did you look at the cars particularly to see the condition they were in?
A. Yes, sir.
Q. State the condition you found them on that day.
A. They were chained up and the draw-head and dead-wood were pulled all out.
Q. Of which car?
A. Of 1804.
Q. Dead-wood and draw-bar all gone out?
A. All gone out and chained up.
Q. Had the brake any connection with the dead-wood or draw-bar of that car, 1804?
A. Not of that car it didn't. No, sir.
Q. The drawing out of the dead-wood and draw-bar wouldn't have any effect or touch the brake?
A. No, sir.
Q. What was the condition of the brake on that car that day?
A. It was, as Mr. Herbert states, that the ratchet wouldn't hold.
A. I mean on 1804.
A. The staff was bent.
Q. Was the chain broken or not?
85 A. Yes, sir; about a foot of the chain hanging on the staff.
Q. Twenty-two hundred and eighty—how was the brake on that?
A. It was one of these step brakes. The dog was out of shape; I don't remember just how it was; it wouldn't hold, anyhow.
Q. Stand there and hold it with your foot was the only way you could make it hold? How was the ratchet as to being worn?
A. It was all worn out.
Q. You have stated to us how long you have worked on this road. How long had you been in this yard at that time?
A. Oh, I had been here six months; five or six months.
Q. You have been in the Fargo yard for this road since that time?

A. Yes, sir.
Q. Up to this date?
A. All but through the winter. I did not work there; commenced a couple of months ago.
Q. Worked up until the winter set in?
A. No; this spring.
Q. Is that the first you commenced in the Fargo yard—this spring?
A. Yes, sir; in the yard.
Q. That's the first you commenced in that yard?
A. Yes, sir.
Q. You worked in this yard about how many months?
A. Seven or eight months.
Q. Had you ever worked on this railroad before?
A. I worked over across in the Mandan yard before I came in this yard.
Q. That was on this road?
A. Yes, sir.

86 Q. While you have been in these yards of this company, in the employ of this company, have you ever known of its having any rule or regulation for the informing of employés, brakemen and switchmen, of the damaged or dangerous condition of cars with reference to their own safety?
A. No, sir; I never did.
Q. Never heard of such a rule?
A. No, sir.
Q. If there had been any such rule, in this length of time wouldn't you have known it, or would you?
A. I think so; yes.

Cross-examination:

Q. How long did you say you had been at work in the yard here prior to the time of this accident to Mr. Herbert?
A. Seven or eight months, I presume.
Q. Down at the river?
A. Well, part of the time at the river; part of the time up town here in these yards.
Q. Was you the only brakeman at both of the places during that time until Mr. Herbert came on?
A. I don't know; I believe he had another man or two, one of them laying off sick, or something.
Q. As brakeman, was you employed mostly down at the river or up here in this yard, or both places, just as services were wanted?
A. Just as services were wanted; some days would be at the river; sometimes staid up here; mostly staid down there, because they had men down there in charge of that engine.
Q. Now, these two cars that were together at the time of the injury to Herbert were loaded with Government freight, were they not?
A. I could not say; they were shoved on the Government track. I believe that is No. 1; I couldn't say; on track No. 1.

87 Q. Why do you speak of it as the Government track?

A. Because the freight houses was all on that track—unloaded on this side—freight cars, generally.

Q. Well, that track was used, then, for shoving cars onto that were loaded with Government freight?

A. Yes, sir.

Q. And doing switching on that track—anything you was a mind to use it for?

Q. These cars were sent down there; they were loaded, were they not?

A. Yes, sir; I presume so.

Q. Do you recollect what they were loaded with?

A. I could not say.

Q. Did you see them unloaded?

A. I didn't see them unloaded; I know they were working at them.

Q. They were unloaded down there, were they?

A. Yes, sir.

Q. Unloaded with freight that went into whose warehouse?

A. I could not say; I presume it was a Government freight-house; I presume it was Government stuff; I don't know what it was,

Q. Cars that came in loaded with Government freight were taken there and unloaded at the Government warehouses?

A. It depended what kind they were loaded with.

Q. Government stuff to be shipped up the river—feed for horses, etc.?

A. That would go down to the river.

Q. How far is it down to the river?

A. About two miles, I believe, to the river landing.

Q. These two cars came down there to be unloaded of their freight the same day of the accident to the plaintiff, didn't they?

A. Yes, sir; I think so.

Q. Do you know what was done with them then?

A. I couldn't say what was done with them.

88 Q. They were shoved there on the track and unloaded, and brought back here to Bismarck to be repaired?

A. I presume; I couldn't say what became of the cars afterwards; I don't know anything about that.

Q. Now, you saw that those cars were coupled together by chains, didn't you.

A. After I had rode them in and got off from them—after I had rode them in from the switch—I didn't know anything was the matter with the cars at all.

Q. When you was upon the cars to try the brakes you didn't notice they were fastened with a chain?

A. No, sir.

Q. How far apart were the cars?

A. Oh, they was the usual width, I guess.

Q. Had you heard of the accident to the plaintiff at that time?

A. No, sir; not until after I came down to the end of the switch

to Mr. Gilboy; I came down to the end of the switch and they told me Dick got his leg hurt.

Q. You didn't see how these cars were coupled—didn't notice this was gone out of the lower part of the car until after you got down off from the cars?

A. No, sir.

Q. When you saw this blood there, that didn't attract your attention any way?

A. I knew somebody must have got hurt there; I went to put my foot down there, saw the blood there, and jerked it up again; I had to hold it; both feet was on top of the car.

Q. Did you turn the brake to hold it with your hands?

A. Yes, sir.

Q. Did you stop the cars?

A. No, sir; I didn't.

Q. Could you bring the brake to bear on the wheels so as to contribute to stop them?

A. I didn't try very hard.

Q. I understood you to say you turned it up with your hands.

89 A. I didn't give but one turn, when I saw his blood; one turn would not take any effect on the cars, you know.

Q. Then you let go immediately, did you?

A. Yes, sir.

Q. The cars stopped themselves?

A. They struck some cars ahead, above me, and I got off.

Q. When they struck the other cars did they come together—the two cars?

A. Yes, sir.

Q. Were those cars unloaded the same day there?

A. I believe so. I couldn't say exactly.

Q. Were these two cars run down by an engine?

A. Yes, sir.

Q. Who run them down—do you know?

A. I don't remember now who the engineer was.

Q. Were they run down by themselves, or the other cars run down with them?

A. There was some cars attached to them.

Q. All that came down together—were they run on the same track or split up after they got down there?

A. Split up after they got down there.

Q. Were those two cars the only two that were run on to the track that they were unloaded on by the Government warehouse?

A. Yes, sir; those were the only two that were run on that track at that time.

Q. Were they taken back that same day; do you recollect?

A. I think the next day or so.

Q. Did you ever know of cars coming into the station here—freight cars—disabled in a train?

A. Yes, sir.

Q. And attached together by a chain?

A. Yes, sir.

Q. When cars get disabled on the road—cars in the middle of a train, that way—there is a breakage, etc., and there is nothing
90 to interfere with their running except attaching them. The practice is to attach them by a chain and bring them into the station, is it?

A. They use their own judgment in that, I presume. They have done it; they have fetched them in chained up often.

Q. Isn't that usual? For instance, if an accident should happen out on the road, say 30 or 40 or 50 miles out, the car would have to be brought in here, wouldn't it? No repair shops nearer, are there?

A. No; but they can set the car out and go there and fix it, if they are a mind to.

Q. Has that been done that you know of?

A. Yes, sir; that's been done.

Q. When the car was able to roll, if the car can roll—no difficulty but to attach it to another car to bring it in—isn't it always the practice to attach it and bring it in here?

A. We have set them out when nothing but there was a bar drawn out, and sent the repairer out to fix them.

Q. Where have you done that?

A. At Crystal Springs. I couldn't say—done it several times.

Q. Was that a loaded car in the middle of the train?

A. I couldn't say it was the end car. Whether it was at the end of the train or the middle of the train, I don't remember about that.

Q. How far from the repair shop?

A. I don't know how far it is; 40 or 50 miles, I guess.

Q. The usual way is to attach them with a chain and bring them in for repair, isn't it?

A. Generally; yes, sir.

Q. Did you ever run on a freight train?

A. Yes, sir.

Q. Have you known of accidents of that kind occurring while you was running on a freight train?

A. Yes, sir.

Q. And known them to be attached that way and brought into the station?

A. Yes, sir.

91 Q. It is necessary where this—what do you call this that pulled out—the draw-head, and so forth, is pulled out—in order to repair that, it is necessary for the freight to be taken out, isn't it?

A. No, sir; I couldn't say whether it's necessary or not.

Q. Aren't these draw-heads fastened by bolts through the bottom of the car inside; haven't you got to get inside and have the bottom of the car clear to put the bolts through?

A. No, sir.

Q. Do you know how they are fastened?

A. The draw-head timbers?

Q. The draw-head and the draw-head timbers. Are not these

timbers that the draw-head works in bolted to the car, the bottom of the car?

A. Yes, sir.

Q. Now, if those are pulled off, you have got to have an empty car to get at it to repair it, haven't you?

A. No, sir.

Q. And unless the bolts come down through the bar has got nothing to hold it. If you take them out the dead-wood will fall off. Now, if these dead-woods were broken and gone, in order to get at it to put new ones on, you have got to get inside of the car at it, haven't you?

A. I don't know; I couldn't say as to that.

Q. Was this whole thing pulled out; the bolts broken to this car?

A. I believe so; yes.

Q. Then, to put new bolts in there, and new timber for the draw-head to work in, it would be necessary to go inside of the cars to get these bolts in, wouldn't it?

A. I presume so; I couldn't say.

Q. Then it would be necessary to unload that car, wouldn't it?

A. I should think so; yes, sir.

Q. The car was taken down there to be unloaded so as to get in a condition so it could be repaired?

A. I couldn't say as to that.

92 Q. It couldn't be repaired without being unloaded, could it; that is, new timbers couldn't be put in and bolted there until the car was empty?

A. Well, it could be repaired without being unloaded. I should say I have seen it done without unloading the car.

Q. When they were damaged in this way?

A. I have seen them put in draw-heads without unloading the car.

Q. How are you going to put the draw-head in the bolts without taking the load out? These bolts were broke, weren't they?

A. I couldn't say.

Q. There has to be a bolt on the inside; the bolt comes through the bottom of the car into these timbers?

A. I couldn't say; I presume so.

Q. You gave your deposition in this case for the plaintiff some time ago at Fargo, didn't you?

A. I guess so; yes, sir.

Q. Defendant wasn't there to cross-examine you at the time you gave your deposition. No person appeared for the defendant at the time the deposition was taken?

A. I don't remember who was there; I couldn't say.

Q. You weren't cross-examined, were you?

A. No, sir; I was not.

Q. Then you came down here in order that the defendant might have an opportunity to cross-examine you, didn't you?

A. I couldn't say whether I did or not.

Q. Your deposition was here on file?

A. Yes, sir.

Redirect examination:

Q. I suppose you came here because the defendant brought you here; wasn't that it?

A. I think that's the reason I came. I shouldn't have come without.

93 Q. Do you know, as a matter of fact, whether these drawbars and dead-woods are bolted to the bottom of the car?

A. I presume they are. I could not say for certain.

Q. You don't know for certain?

A. I couldn't say.

WILLIAM MCBRIDE, being called on the part of the plaintiff and first duly sworn, testifies as follows:

Q. Where do you live?

A. At Fargo.

Q. How long have you lived there?

A. About eight months.

Q. Where did you live before that time?

A. Bismarck.

Q. How long have you lived here?

A. Over a year.

Q. What was your business while here, and what is your business at Fargo?

A. Well, part of the time I was here I was occupied as fireman on a locomotive.

Q. On what, Mr. McBride—in the yard or on the road?

A. In the yard; switch-engine.

Q. Fireman on the switch-engine in the yard?

A. Yes, sir.

Q. To come right at the point, do you remember the accident by which Herbert lost his leg?

A. I do.

Q. Where were you at that time?

A. At the river landing.

Q. Well, how and when did you first hear anything of it?

A. First heard of it when Mr. Gilboy—that's the yard-master—brought those cars to the river, and threw them in on the side

94 track, and the brakeman was riding them, and they struck some other cars pretty hard. Just through curiosity I asked him what was the matter. He said some one must have got hurt on that car—there was blood on it.

Q. After you heard this coming together, did you do anything—look at the cars?

A. Well, after that—we was engaged there—I went over and looked at the cars.

Q. Did you say that they came together pretty hard?

A. They came together pretty hard.

Q. Hence arrested your attention?

A. I was looking at them.

Q. You went over and looked at them?

A. Yes, sir.

Q. Do you remember the numbers?
A. Yes, sir.
Q. What were they?
A. Eighteen hundred and four and twenty-two hundred and eighty.
Q. What did you see when you looked?
A. I saw that the brake was damaged on 1804; the chain was broke, about a turn of it around the staff, and the rest hanging loose. The staff was bent at the top.
Q. What else did you see?
A. Well, the draw-bar and dead-wood was pulled out.
Q. How long have you been working in this yard, do you say?
A. I guess I was working there at that time over a year.
Q. How long since you have worked in the yard?
A. In Bismarck, here?
Q. In any point for this company.
A. I worked here—well, I don't remember how long; then worked at Fargo for a month; then as fireman of a switch-engine ever since.
Q. I will ask you if you have ever heard of any rule making it the duty to notify the brakeman, or any of the employés, of any defects in the cars, so that the employés could guard against injury to themselves?
95 A. No standing rule that I ever heard, except that the yard-master might tell you.
Q. Did the yard-master ever tell anything, as far as you knew, even of his own accord, in this manner, except for the purpose of settling these cars on the repair track, say this car was out of order?
A. Not in this yard; he wouldn't tell me. I had nothing to do—while I was switching there I was never told at all.
Q. You wouldn't hear it here?
A. No, sir.

Cross-examination:

Q. What were those freight cars sent down to the river for?
A. I don't know what they were sent down there for. I was there at the time they was fetched down there.
Q. On to what track were they run?
A. On to No. 1, I think.
Q. Were they unloaded there?
A. Yes, sir.
Q. What were they loaded with?
A. They were billed, I think, "Government feed." I think that's what there was on the bags—"Government feed."
Q. Government freight or Government feed, was it, was to go from there either up the river or down the river? Somewhere to the military posts, wasn't it?
A. Or to be used at Fort Lincoln. Wherever it was to go, they unloaded it there at the warehouse of Government freight
Q. Government feed, was it, that was brought in from the East, and taken down to the river and unloaded at the Government warehouse?

A. Yes, sir; or else at the levee, and covered over with tarpaulin out of the rain.

Q. Didn't unload it up here?

96 A. No, sir.

Q. These two cars having that kind of freight in were taken down to the river to have their freight discharged there?

A. Yes, sir.

Q. Were they unloaded there that same day, do you think?

A. I don't know whether they was unloaded that day or the next. The brakeman told me to tell the engineer to handle them easy, because they was "bad-order" cars.

Q. The brakeman told you to tell the engineer to handle them easy—they was bad-order cars?

A. I think that was the next day.

Q. That was the next day after he was hurt?

A. I think so.

Q. Do you know anything about where the injury to these cars occurred, and when?

A. I don't know but just by hearsay. I heard it was out at fifteenth siding.

HARRY WATKINS, being recalled as a witness on the part of the plaintiff and first duly sworn, testified as follows:

Q. Mr. Watkins, do you know whether these cars referred to, 1804 and 2280, were or were not cars of the Northern Pacific Railroad Company?

A. They were, both of them.

Q. Had "Northern Pacific Railroad Company" written on them?

A. Yes, sir.

97 Dr. H. R. PORTER, being called as a witness on part of plaintiff and first duly sworn, testifies as follows:

Q. You live in this place, I believe?

A. Yes, sir.

Q. How long have you lived here, Doctor?

A. Eight years.

Q. What is your business?

A. Physician and surgeon.

Q. Have been for all of that time?

A. Yes, sir.

Q. You are the surgeon, I believe, of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. By them you were employed and paid for attention to this case?

A. Yes, sir.

Q. Well, Doctor, you remember the injury to this man?

A. Yes, sir.

Q. Well, you may state to the jury what kind of an injury that was.

A. He had a broken leg just below the knee. The bones were

crushed, both of them, and the soft parts, the muscles. The soft parts were bruised and crushed up pretty bad.

Q. You say pretty badly—were they not very badly?

A. Yes, sir; very badly.

Q. The bone for what distance was crushed up?

A. Oh, between two and three inches.

Q. Well, was it possible by good treatment to save the leg?

A. No, sir.

Q. How long did you make the attempt before the amputation took place?

A. I don't remember; I think it was a week or 10 days.

Q. You heard his statement—10 or 12 days. To the best of your recollection, was it or was it not about 10 or 12 days?

98 A. Yes, sir.

Q. This was the time then, before it had the appearance that it was utterly impracticable and impossible to save the leg?

A. Yes, sir.

Q. Then what was done?

A. Amputated.

Q. You performed the operation?

A. Yes, sir.

Q. After the operation was there any trouble, Doctor?

A. Yes, sir; the third or fourth day the artery sloughod off and bleeding took place—had to be taken up.

Q. Then you had to tear it open again?

A. Yes, sir; tore it open and tied the artery again.

Q. It was a very painful and bad operation, I suppose?

A. Gave him chloroform. He didn't feel it much. It was a bad operation and serious. The artery sloughed off.

Q. It kind of decayed and rotted off?

A. Yes, sir; that's what sloughing means—rotting.

Q. That opened it so that the blood was escaping very rapidly?

A. Yes, sir.

Q. It looked a very serious and dangerous matter—as if he might bleed to death before you could possibly stop it, didn't it?

A. If I hadn't been there pretty quick he would have bled to death. I got there and stopped it.

Q. He was pretty near bled to death; wasn't he?

A. Yes; he lost considerable blood—pretty weak.

Q. Wasn't he very weak, as far as you could see; if you hadn't been there on the spot, wouldn't he have died almost immediately?

A. No, sir; he would have lived some time, because they had a tourniquet on his leg, screwed up tight. He would have lived some little time; but wouldn't have lived long if I hadn't been there pretty soon.

Q. Was there anybody there to assist you?

99 A. Yes, sir; Mr. Hoffacker and Mr. Douglas.

Q. Mr. Hoffacker, one of the employés of the road?

A. Yes, sir.

Q. He is here now?

A. I believe so.

Q. Now, wasn't it somewhat difficult for you to find the artery?
A. It is always a difficult job.
Q. You got hold of it and tied it, and it broke off again?
A. Yes, sir.
Q. It was so rotten?
A. Yes, sir.
Q. It was maturated, was it not?
A. It was red and inflamed—some pus there, some matter—but it was in good condition; would have healed up nicely if it hadn't been for this sloughing; of course, taking it up that time it looked very bad.
Q. You say it would have healed—if it hadn't rotted it would have healed?
A. The balance of the stump would have healed all right if it hadn't been for that.
Q. How long did it take you to find that artery?
A. Oh, I don't know—a few minutes.
Q. You tied it up?
A. Tied it up.
Q. Do you know anything about whether there was any subsequent operation made necessary?
A. I don't know only what he said about it; the stump sloughed off after this loose, so it bled; the bone wasn't very well covered; after this, I believe, he had some more of it taken off.
Q. Permit me to ask you, Doctor, if the reason of this not healing was not his having bled so much—so low vitality that the healing process didn't go on, but sloughed off; that his vitality was so low from the escape of blood that it decayed instead of healing?
A. Yes, sir.
100 Q. Where was the leg taken off?
A. Just below the knee, what is usually called the upper third; the leg is divided into thirds—the upper, lower, and middle third; this was the upper third.
Q. During all this time you were trying to save the leg, of course the vitality of this man was running down?
A. Yes, sir.
Q. To leave a man with such dead matter as that there would and did, did it not, reduce his vitality very seriously?
A. Yes, sir; it would have been much better if it had been taken off the day it was hurt.
Q. All the time that was going on it was having a very serious effect on him?
A. Yes, sir.
Q. He was losing ground all the time very rapidly, was he not?
A. Yes, sir.
Q. Permit me to ask, Doctor, if there wouldn't have been great pain if you hadn't given anæsthetics?
A. Yes, sir.
Q. To prevent this pain you did give him anæsthetics?
A. No, sir; I didn't give him anæsthetics; I gave him opiates of morphine.

Q. You continued to give him that until the time of amputation?

A. Yes, sir.

Q. How long did you continue the opiates after the amputation?

A. Oh, kept them up for a week, more or less; first gave him considerable, then let him drop off—gave him less.

Q. I suppose after the amputation, on account of his very low vitality from the several reasons you have explained, he didn't feel the pain as much as a man would with some degree of vigor, did he, or did he [not]?

A. I don't know as that would make any particular difference.

Q. Does a man that's nearly bled to death—does he feel
101 pain as much as a man that has considerable vigor and vitality?

A. He feels it pretty acutely.

Q. Does he feel it as much?

A. I couldn't say; he hadn't lost so much blood but that he could feel acute pain.

Q. Now you volunteer the statement, I will ask you if, when his hand was lifted, wouldn't it drop right down as though it was dead?

A. No, sir; it wouldn't.

Q. You swear to that.

A. Yes, sir.

Cross-examination:

Q. I understood you to say that you was employed and paid by the company for your attendance upon this man?

A. Yes, sir.

Q. You are employed regularly by the company, are you not?

A. Well, they give me all their cases; I always attend them.

Q. It's the practice of the company, whenever any of its employés sustain an injury, without reference to whose fault it was, anything about it, to furnish all the medical aid that's needed?

(Objected to, and the plaintiff states that he does not claim that because the company employed this doctor they admitted their liability. Question withdrawn.)

Plaintiff rests.

102 *Defence.*

Defendant moves the court to dismiss this cause upon the ground that the plaintiff has failed to establish a cause of action, and motion overruled by the court, to which ruling the defendant excepts.

E. D. POMEROY, being called as a witness on the part of the defence, testifies as follows:

Q. Where do you reside, Mr. Pomeroy?

A. Fargo.

Q. What has been your business for some time past?

A. Conductor, lately; for the last two years, or year and a half.

Q. Do you recollect a year ago last fall of the plaintiff, Mr. Herbert, receiving the injury in question in this trial?

A. Yes, sir.

Q. Was you on that train of cars that came in that day, that had this defective car in that's been spoken of?

A. Yes, sir.

Q. In what capacity were you on that train?

A. Brakeman.

Q. How long had you been acting in the capacity of brakeman for the company?

A. Well, the biggest part, I guess, of six or eight months.

Q. Between what points did you run?

A. Between Fargo and Bismarck.

Q. You was brakeman on that train that brought in this defective car that is spoken of?

A. Yes, sir.

Q. How many cars were there in that train?

A. Well, I don't know just exactly now.

103 Q. About how many, as near as you can state?

A. Well, I should say all the way from 16 to 24.

Q. Was it a loaded train?

A. Yes, sir.

Q. Do you know what it was loaded with; whether it was Government stuff or merchandise?

A. Well, it was merchandise, and, I think, railroad material; I think we was drawing material at that time.

Q. That train came in, did it, the same day the plaintiff received the injury?

A. Yes, sir.

Q. What time did the train arrive here?

A. Well, I am not able to say; I think that our time was 2 o'clock; we was very near on time, I think—might have been a little late, for what I know; I know it was in the afternoon.

Q. Now, did this car, No. 1804, receive any injury as you was coming in?

A. Well, I don't recollect the number coming west that day that he got hurt; we brought the car in here.

Q. The car in that was injured?

A. Yes, sir.

Q. About how far east from here was it that the injury to that car happened?

A. About 30 to 36 miles—a little over that.

Q. What was the character of the injury to the car?

A. The draw-head and draft timbers was pulled out.

Q. Do you know how that happened? Just state how that happened.

A. Well, no; I don't know as I can; I can't tell just the cause, but it was when we was running along the road; whether it was going over sags, or whether it was the working of the engine pulled it out—it was a jerk that pulled it out.

Q. What was the result when that was pulled out, to the train?

104 A. The train parted; when we got to the foot of the hill, stopped it, and pulled up together.

Q. How were they chained together?

A. Chained the car ahead through the draft-iron or draw-head, rather, and around the center-pin of the car that the draft timbers pulled out of, and draw-head.

Q. Did this draw-head, when it was pulled out, fall down on the ground, or what became of it?

A. It dragged along, then we uncoupled it; I ain't positive whether we brought in here—I am under the impression we did—brought it in the car in here to Bismarck.

Q. What broke?

A. Everything came out—nothing to break but the bolts—the timbers was there.

Q. Did the bolts break that fastened it to the bottom of the car?

A. Well, I didn't examine the bolts; I suppose they must have broke, or it would have staid there; the bolts must have broke, or the draw-heads wouldn't have given way; it is not likely, I don't suppose; they may have been worn out.

Q. Whereabouts in the train was this car?

A. I should judge about one-third of the way from the caboose.

Q. About how many cars were behind it?

A. About six or seven cars.

Q. Did you fasten the two cars together with the chain yourself?

A. Yes, sir.

Q. There has been some testimony as to the brake of that car, or the rod or shaft of the brake, being bent; state how that occurred, or whether it was bent before this accident occurred?

A. Well, that I could not say—whether it was bent before or not.

Q. Had you noticed it bent before?

105 A. But the cars jamming together naturally would bend it. The cars naturally jamming and pulling together on the road, after it was chained together, would naturally bend the rod.

Q. Had you noticed it bent before then?

A. No, sir.

Q. Had you noticed any difficulty in the working of the brakes before the accident to that car?

A. Not that I remember of. It might have been in good order or bad order; I don't recollect that.

Q. You don't recollect of there being any difficulty in its working prior to the accident?

A. No, sir, I don't remember.

Q. Do you recollect about there being any difficulty with the brake of the car that was next to it—2280?

A. No, sir I don't remember in regard to the brakes at all. I don't know as I used them—I don't know but what I did—that day.

Q. Do you recollect that car that had this step brake?

A. Yes, sir.

Q. You recollect the car?

A. Yes, sir.

Q. You don't recollect whether you attempted to use that brake that day or not?

A. No, sir.

Q. Had you ever run that same car over the road before or not; do you know?

A. I couldn't say; undoubtedly have.

Q. Do you know where that car came from?

A. Yes, sir.

Q. Where?

A. From the Lake Superior road.

Q. Do you know how long the Northern Pacific Company had had it?

A. I do not.

Q. Do you know how they came to have it?

106 A. Well, I have been informed how they come to get it.

Q. You don't know how long the Northern Pacific Company had had the car?

A. No, sir; I do not; and I am not positive the Lake Superior road ever had the car, either.

Q. You never saw them have it?

A. No, sir.

Q. Was it an old car or a new one?

A. Well, that I can't tell. You can't tell by the looks of a car how old it is.

Q. Do you know how long that train had been in Bismarck here before the yard-master and the others came up to break it up?

A. No; I couldn't state the time.

Q. Are these accidents such as happened to this car of frequent occurrence on the road?

A. Yes, sir.

Q. What do you do with them when such an accident occurs?

A. Chain them together and take them to the nearest station where they can be repaired, if it's so that we can take them.

Q. You pursued the ordinary course with this car?

A. Yes, sir.

Q. A case of such accidents?

A. Yes, sir.

Q. The company have repair shops here?

A. Yes, sir. Well, they don't have repair shops—have a car repairer.

Q. Who was the conductor of that train?

A. James Pillen.

Q. Where is he; do you know?

A. Yes, sir; he is in Fargo; running between Fargo and Jamestown.

Q. This was the western terminal point of the road for hauling freight, was it not, at that time?

107 A. Yes, sir; well, I can't say as to that; I guess they were building across the river.

Q. The cars that were coming here couldn't cross the river?

A. Well, I am not positive whether they transferred here at that time or not.

Q. You couldn't cross the river with the train, could you?

A. Well, no; not unless you had something to cross on; I am not positive about the transfer being here; was hauling material at that time; I don't know whether they were transferring at that time or not.

Q. I am not speaking of railroad material, but general merchandise; this was the end of your route?

A. Yes, sir.

Cross-examination:

Q. You say that car was injured out there that day, Mr. Pomroy?

A. Yes, sir.

Q. You say that injuries to cars are not unfrequent on the road?

A. Yes, sir; it is not unfrequent at all.

Q. Some of these cars are somewhat old and out of order?

A. Yes, sir; I can't say whether out of order, because we are supposd—they are supposed to be in good order. I couldn't say that that car was out of order, but our cars at that time were a good many of them old cars.

Q. Yes; and somewhat out of order, were they not?

A. Well, that's the only way we have to find out when they were.

Q. Well, now, ain't it so that a good many of them were out of order?

A. Well, no, sir; I can't say as they were; of course, when we take a car out it's apparently in good order; I don't known hardly how to answer that question.

Q. You would rather not answer it, would you?

108 A. No, sir; that ain't it. I am perfectly willing to answer it. We have no way of telling whether a car is in perfect order or not.

Q. This car, 1804, how about that? Do you remember about what kind of order that was in?

A. I guess the car was in perfect order, all except the draw-head.

Q. You guess so. Now, would you swear so?

A. No, sir; I couldn't do that.

Q. That was the one you said you guessed came from the Superior road?

A. No, sir; 2280.

Q. You say you wouldn't say certain as to that?

A. As to being in bad order or good order?

Q. No; as to its coming from the Superior road.

A. The car was apparently in good order.

Q. You at first said the car was purchased from the Superior road; then, afterwards, you corrected yourself and said you wouldn't state positively.

A. I am not positive.

Q. You say you don't want to say positively that they did or did not?

A. I would say I don't know; that's what I have been informed.

Q. That's all you know; somebody told you so?
A. Yes, sir.
Q. On that car, 1804, was there any connection between the draw-bar and dead-wood and the brake—on 1804, remember, now; the one the draw-bar and dead-wood were pulled out?
A. No, sir.
Q. None?
A. No, sir.
Q. Do you know that the brake on that car was also broken, as well as the draw-bar?
A. No, sir; I don't know that it was broken.
Q. Do you know that it was not?
A. No, sir.
109 Q. You don't remember know it was broken at that time or not?
A. No, sir; I don't.
Q. You don't know whether the brake on 2280 was out of order then or not, either?
A. No, sir.
Q. Isn't it a fact that these step brakes were not good brakes anyway, and you didn't use them when you could help it?
A. Well, they are an unhandy brake; they are a brake I never stop to set up, provided I can get where there are other brakes—top brakes.
Q. As to this one, whether it was out of order or not, as stated by——
A. I don't know, sir.
Q. There is no way of setting the brake on one of these cars except by putting the foot down on that platform?
A. That's the only way, sir.
Q. How far was that platform down?
A. I should judge a foot or a foot and a half.
Q. You spoke something about that the bolts might have been worn out on that where the draw-bar and dead-wood were drawn out?
A. That I couldn't answer either way, because I didn't pay any attention to it. If I noticed them I have forgotten.
Q. Couldn't answer whether they were or were not worn out?
A. No, sir; if I noticed them I have forgotten.
Q. Do you remember whether that was or was not an old car, the one out of which the draw-bar and dead-wood was pulled?
A. Well, it was a Northern Pacific car. I can't tell you how old the car was—how long it had been running.
Q. Did you state—your last answer was—that the brake on that had no connection with the draw-bar or dead-wood?
A. Yes, sir.
Q. That was on the car with the draw-head out?
110 A. That's on the car with the draw-head out.
Q. Eighteen hundred and four?
A. Yes, sir.
Q. You say undoubtedly you had had that car—that is, with the

step brake—over the road before; but you don't remember any particulars about it?

A. I undoubtedly have a great many times.

Q. You don't know how long that brake on car 1804 had been broken?

A. Well, I don't know as it was broken. I don't know but it was.

Q. You don't know that was broken at all? You don't know [how] long it had been broken?

A. No, sir.

Q. You didn't know of its being broken on that trip?

A. No, sir; I have no recollection of it.

Q. You would likely remember it if it had been broken on that trip?

A. Well, I don't know whether I would or not.

Q. If that chain on the brake had been broken——

A. Yes, sir; I understood.

Q. Don't you think you would be likely to?

A. I think likely I would remember it.

Q. And you don't remember that it was broken on that trip?

A. No, sir.

Q. While making the trip?

A. I don't recollect.

Redirect examination:

Q. Mr. Pomroy, the draw-bars or timbers to the draw-bars are what are bolted to the car, are they not?

A. Yes, sir.

Q. Well, is there any play upon these bolts? They are firm—solid—in their place, aren't they?

A. Supposed to be; yes, sir.

111 Q. There is nothing, then, that could wear them anyway, is there; that is, no friction upon them to wear them?

A. Well, there is that heft that the car, of course, pulls on those bolts.

Q. It is simply a pull upon the bolts? The bolts are firm, so that there is no friction wearing them—rubbing them?

A. Supposed to be firm.

Q. They couldn't wear, then?

A. Well, I don't know. I guess if they would get loose they would break off as that did.

Q. They would have to break?

A. They would have to break to get those timbers off.

Recross-examination:

Q. Isn't it a fact that there is a great deal of friction and wear? For instance, when they slack back and push one way and start ahead and pull the other, that naturally, I should think, would wear it loose. Don't you know they do that?

A. Yes, sir.

Q. If the car had been an old car, and wore a long time, they might wear loose and pull out, might they not?

A. Well, we ain't supposed to take that kind of cars.

Q. Now, do you mean to swear to this jury that that wasn't that kind of a car?

A. No, sir; I cannot. What I mean to say is, I can't say but what that was perfectly stationary.

Q. You can't say but what it was worn in just the way I say, can you, and those bolts worn out?

A. No, sir; I can't say that or anything else.

Q. It would naturally wear that way, wouldn't it, working back and forth?

A. Yes, sir; that's the way they get loose, I believe.

112 Redirect examination:

Q. There is nothing but wood to wear against those bolts, is there?

A. Well, now, I am not prepared to tell you just how them bolts are fixed.

E. L. GILBOY, being called on the part of the defendant and first duly sworn, testifies as follows:

Q. Mr. Gilboy, where do you reside?

A. Bismarck.

Q. What is your business?

A. I am yard-master.

Q. For the Northern Pacific Railroad Company?

A. Yes, sir.

Q. Do you know the plaintiff, Mr. Herbert?

A. I know the gentleman.

Q. How long have you been in the employ of the company as yard-master?

A. Let's see. It will be five years the twenty-seventh of this month.

Q. Where? Here in Bismarck?

A. At Bismarck all that time.

Q. Does the yard at Bismarck extend to and include the tracks at the river?

A. It does; yes, sir.

Q. Were you present at the time of the accident to the plaintiff on the twenty-fourth of October, 1879; I think it was the 24th?

A. Yes, sir; Friday, the 24th, I believe it was.

Q. What time was that freight train due, if you know, that came in that afternoon?

A. I think their regular arriving time was 2 o'clock in the afternoon.

113 Q. State, if you know, what time they did arrive.

A. They arrived at 3.45 sharp.

Q. State whether or not you waited any length of time for their arrival to switch the train.

A. No, I didn't; as I went to the river something shortly after dinner, and the train had arrived while I was absent.

Q. Did the plaintiff go to the river with you?

A. Yes, sir.

Q. When you came back, state where and how this freight train was. Well, just before that. What did you go to the river for?

A. On—I don't remember exactly what we did go there for—always have more or less work there that we go down to finish—to work at nothing in particular that I remember.

Q. When you came back, state whether or not you brought some passengers in a box car?

A. I don't remember as to that.

Q. You don't remember as to that?

A. No, sir; I don't.

Q. When you got back to Bismarck, state where and how this freight train was that had arrived in your absence.

A. It was on No. 2 track; what we call "No. 2 track;" have our tracks numbered. Train had arrived and was standing there when I came up from the river; came up on the main line.

Q. What track would you call the main line?

A. Well, the main line, to designate it so you would understand it, was the second one from the Sheridan House, straight track, running right through the yard.

Q. When you came up who came with you?

A. Well, I don't remember now anybody in particular.

Q. Did the plaintiff?

A. Mr. Herbert was on the engine at the time. Our regular engine crew was there, of course.

Q. Who was the engine crew?

A. The engineer was Henry Hoffacker, and the fireman was Rust.

114 Q. The freight train was standing on No. 2 track, was she?

A. Yes, sir.

Q. State whether or not the engine that had brought the train in had been detached and taken away.

A. She had been; I didn't see any engine when I came up there.

Q. State so the jury will understand you—when you came what you and Mr. Herbert done with reference to this train?

A. Well, the first thing upon the arrival of a freight train it is necessary for me to get the numbers of the cars in that train—each car is numbered—to get the numbers of those cars, and also the contents of the cars. I copy those on the yard-book—what we all call a yard-book; every yard-master has a yard-book he uses for reference in reference to the cars. I went into the office to take a copy of this train. We have what we call a receiving book; the numbers of the cars are taken down and put on that book, and the contents of the cars are taken from the way-bills; a way-bill accompanies each car; the conductor has the way-bills with him and turns the bills into the office, and those are copied on to our freight train receiving book, the contents of each car noted opposite to the number. Well, I came up and took an exact copy on my book, the same as the one on the freight train receiving book; of course that gives me information.

Q. State right there whether Herbert went to the office with you.

A. I don't remember exactly that he did. I think I told him, although I am not positive about this, that I told him to set the caboose in. I think very likely I did, because generally that's the first move made—to set the caboose off on some other track; but I am not positive as to that.

Q. You got the numbers; then what?

A. I got the numbers, and before I had finished taking the numbers Mr. Herbert came in the office. I was in the office. Whether he came in with me at the time, or if I told him to detach the
115 caboose and side track it on some other track, I can't say. He was in the office before I had finished taking the numbers; he came out with me.

Q. Now, on which side of the train did you and Herbert go; where were you when you came out of the depot?

A. Of course I came direct from the office to the train; that would fetch me on the north side of it.

Q. Well, did you walk along the train?

A. I can't say.

Q. To check your numbers?

A. I can't say that I did, although I think—I usually commence at one end of the train; either one end or the other; it matters not which, that is, to me, as regards checking them—usually start at one end and check off the car numbers by my book and whether I commenced at—I would be very likely—I know I didn't go to the west end of the train to do that on this particular occasion; no, I must have commenced at the caboose end—no doubt of that at all—and went down to where the disabled car was.

Q. Did Herbert go down with you?

A. Herbert was standing at the car when I was speaking to Mr. Quinlan; standing at the disabled car.

Q. When you spoke to Mr. Quinlan. Who was Mr. Quinlan?

A. Mr. Quinlan is the car repairer; in charge of the car repairing; he is foreman.

Q. When you and Herbert went down to the disabled car on which side of the train were you?

A. I was on the north side.

Q. On which side was Mr. Quinlan?

A. On the south side; on the opposite side to me.

Q. State whether or not Mr. Herbert was close to you?

A. I think he was, if I mistake not; he stood to my left; I was facing the car when I was talking.

Q. Was he within hearing distance?

A. He was, indeed.

Q. Of the conversation?

A. Yes, sir.

116 Q. State what the conversation was between you and Mr. Quinlan?

A. Mr. Quinlan asked me what the car contained—the disabled car—he asked me what it contained. I told him that it was oats for the quartermaster—Government oats. I asked him then if he

could fix the car. He said no; that it would be necessary to unload it before it could be fixed. I might have known that without asking him, because I am familiar enough to know that. I remember of asking him the question at the time.

Q. Where would you have to take a car loaded with Government freight to unload it?

A. It would be necessary to take it to the river landing. The oats were there unloaded in the Government house, or, if there was a steamboat there, loaded direct from the cars.

Q. At the time you went there and had this conversation, was you and Mr. Quinlan examining this disabled car?

A. He was standing there—had examined it. I looked at it and saw its condition at once.

Q. What was the condition of the car?

A. The condition of the car was that the draw-head timbers were pulled out of it. The draw-head was gone and also the dead-wood. The draw-head timbers are the timbers which project from the bottom of the car and hold the draw-head in place, and the dead-wood is the timber which is directly over the draw head timbers, and fastened directly at the end of the car, in the center of the car directly over the draw-head timbers. Dead-wood or bumper. Some people call it the bumper; that's a term that's not used much now.

Q. Was Herbert there looking at the cars at this time?

A. Yes, sir; he was.

Q. State how the cars were attached together, if at all.

A. They were attached in the ordinary way by a chain—a regular chain which we use for that purpose.

Q. When you say ordinary way, explain to the jury what you mean by ordinary way?

A. The ordinary way is: There is directly over the truck a
117 casting—over the truck in the car. It's very similar to the king-bolt in a wagon; that's about the most explicit way you have for a man that is not perhaps familiar with cars. Directly over the trucks, attached to the body of the car, is a timber running the full length of the car—I don't remember exactly what the name of the timber is—attached to this casting, and that casting sets into another one on the truck. The car revolves on this, which is necessary in going around curves; and the chains are made—in fact, always are—to fasten directly around that center casting—the end of it—and carried forward to the draw-head of the car, to which you chain it to.

Q. In front of it?

A. Yes, sir.

Q. Is that how this car was?

A. Yes, sir; that's how this car was; that's the only secure way of chaining two cars together.

Q. How far apart were these cars—this car that was chained to the other car, and the next one to which it was chained?

A. Well, I should judge it was about the ordinary distance the cars would have been apart, provided there had been two draw-heads—one in each car.

Q. Now, the dead-wood and draw-bar being gone, it would leave the end of the car perfectly bare?

A. Yes, sir; it does; no projection whatever.

Q. When the dead-wood and draw-head and draw-head timbers are gone?

A. Yes, sir.

Q. Was that all gone in this car?

A. Yes, sir.

Q. That would leave the end of the car perfectly bare?

A. Yes, sir; perfectly bare—no projection.

Q. All there was in that distance between the two cars was the chain on each side as it was attached around the draw-head of the other car?

A. Yes, sir.

118 Q. Where the bumper is—the dead-wood and draw-bar are—there was simply the two chains or the one chain?

A. Just the chain.

Q. You say Mr. Quinlan told you it would be necessary to unload the cars before they could be repaired—to unload that car? What did you then do?

A. We proceeded to switch the train then.

Q. Just go on and tell what you done in reference to switching the train. In the first place, Herbert had removed the caboose, had he?

A. Yes, sir; the caboose had been taken off.

Q. Well, was the train first pulled up past the switch?

A. No, sir.

Q. It wasn't?

A. No, sir; it was not.

Q. State what you done in breaking up that train.

A. Well, in switching it, we usually get cars of the same lots—that is, cars taken down as for the same destination in the yard; usually get them together as much as possible. The last cars next to the caboose was five cars of ties—Northern Pacific stock cars loaded with ties. Their destination was the Missouri Division, for construction purposes. Well, I cut those ties off and throwed them down the main line the first thing.

Q. From which end of the train were they?

A. They were on the east end, next to the caboose, as the train arrived in the yard.

Q. That would be the rear end of the train coming in?

A. Yes, sir; Mr. Herbert rode those cars down the main line and stopped them—five stock cars—stopped them on the main line. I held the switch-engine; let it back on the train—what was left of it. I then cut off the four cars next, which included also the disabled car and the one it was chained to, and throwed the three cars down the main line.

Q. You cut off four cars, which included the disabled and the one it was chained to?

A. Yes, sir.

119 Q. You say you threw three down the main line?

A. Three down the main line.

Q. Were those three the east three or the three west?

A. They were the west three. I kept one with the engine—car 1274.

Q. Then there was on the train six cars before you came to the disabled car?

A. Yes, sir.

Q. There was five cars of ties and the one which you kept with the engine?

A. Yes, sir. No, it would be seven cars before coming to the disabled car.

Q. Well, was the disabled car—the one that the draw-heads and timbers was out—was that on the rear?

A. It was on the rear. Let me see: There was five of ties and one containing town freight—the car 1274, and 1034 came next; 2280 or 1804 was next, and 2280 was next to that.

Q. You cut off four and put three down the main track?

A. Three down the main track.

Q. Give the numbers of those three.

A. There was—first coming down the main track was car 2280; next, 1804; and next, 1034; 1274 was the one I had with the engine.

Q. When you say you run those down the main track, you mean they ran down the same track as the ties?

A. As the ties which I had previously thrown down there.

Q. State whether or not you gave Mr. Herbert any signal at the time you cut off those three cars to run down the main line.

A. No, sir; I did not.

Q. Did you say a word to him?

A. No, sir; I did not. I had no occasion to. I suppose I had confidence enough in him to suppose he understood his own business—to catch the cars.

Q. Well, Herbert got up onto those cars?

A. Yes, sir.

120 Q. What did he do, if you saw him?

A. I didn't see him. The first I saw of him after that was when he was caught. I know that he made an effort to set the brake and was caught in that position, but whether he made an effort to set that particular brake or not I can't say.

Q. Now, there were three cars attached together?

A. Yes, sir.

Q. This injured car being one of them?

A. Yes, sir.

Q. There were two known as top brakes?

A. Yes, sir; two of them.

Q. And one which is known as a step brake?

A. Yes, sir.

Q. The step brake, then, was next to the injured car?

A. Yes, sir; next to the injured car.

Q. It was the west car; next west of the injured car?

A. Yes, sir; the brake was on the east end of the car with the step brake.

Q. What did you do with that car that you retained with the engine?

A. That was a car of apples. It was what we call a town car. It was a Bismarck car, proper. I throwed that in on another side track.

Q. You were running that car in onto another track, while these were running down to Herbert?

A. Yes, sir.

Q. What were those three cars you threw off together loaded with?

A. Two of them, 2280 and 1804, loaded with Government grain. They were marked "Oats for A. Q. M., Bismarck." That means river landing. The other car, 1034, was billed, "Hay for Walker Bros., Mandan."

Q. Then these three cars thrown down there together were to go to the river yard?

A. To the warehouse below—the ——— wasn't—it was to go below.

Q. It would be to the river landing?

121 A. Yes, sir; that would be the proper destination.

Q. At the time you commenced switching this train, was there any conversation between you and Herbert as to who should cut the cars off, and who should catch them?

A. No; I don't remember that there was. It was generally understood. I always tend the switch and cut the cars when only two of us are working, because I know the proper place to cut the cars off at.

Q. You have the way-bills and contents?

A. Yes, sir.

Q. Breakmen, as a rule, don't have them?

A. No, sir; not as a general thing, unless he is acting for me.

Q. Then you, or some one who had the numbers and knew the contents of the cars, would be the only person who could cut them off properly?

A. It would depend altogether upon the number of men. If there was more than two—two men working with me—one of my men would cut off, perhaps, while I would tend to the switch and give him signals which car to cut off. We have signals which we use in cutting off.

Q. What was done with those three cars that were thrown down there, especially this disabled car?

A. What was done with it at what time?

Q. That afternoon you threw them down the main track?

A. They were taken to the river.

Q. For what purpose?

A. For the purpose of being unloaded and delivered at their proper destination.

Q. After the disabled car was unloaded, state whether or not it was repaired.

A. It was immediately afterwards. Was brought down to the yard where the repair shops are. It would be necessary to bring it up here to have it repaired.

Q. During the time you have been in the yard, Mr. Gilboy, has it been a matter of frequent occurrence, cars coming in disabled, as this car was?

122 A. Well, it's something that I don't pay any particular attention to. They do occur. You might not say frequently.

Q. Well, not exactly like this, but cars coming in disabled?

A. They did come in sometimes, but whether similar—I don't remember a similar case to this one in all my experience as yardmaster—that is, in this yard. I don't remember of seeing a single car come in here that had all the appliances pulled out of it, although I can't say it might not have occurred; because, perhaps, I would not have paid any particular attention to it, on account of no accident having happened on it.

Q. Who first notified you of this car being disabled?

A. Quinlan.

Q. Was he standing there at the car, examining it?

A. Yes, sir; he was directly opposite.

Q. Was that when you and Herbert were walking along together, or nearly together?

A. Yes, sir; it was when we came to the car.

Q. You didn't know it was injured, then, until you came there preparatory to breaking the train up?

A. No, sir; I did not.

Q. And found the car repairer there at that time, examining it?

A. Yes, sir.

Q. Supposing the brake had been put on this car with the step brake so as to stop it—this step brake had been applied on that car so as to arrest the motion of that car and the others; what would have been the effect upon the injured car as to coming together—jamming up—against the others?

(Objected to, as immaterial and incompetent, and objections overruled by the court; to which ruling plaintiff excepts.)

A. Well, it would depend altogether upon how the brake was set how soon the car would stop. If the brake had been set on 2280 so as to stop the car instantly, it would, probably——

123 Q. Well, as brakes are usually set?

A. Some of them don't hold quite as much as others, although they are in good repair. It would very likely—well, it would very likely injure a man standing, but to what extent I can't say.

Q. Applying the brake to the first car, what effect would it have upon the car that had the dead-wood gone? In other words, would they come together?

A. They would certainly, as there was no brakes set on the last cars, 1804 being east of the other. If stopped suddenly, of course it would jam up onto 2280—of course, naturally would.

Q. There would be the momentum of the two cars?

A. And the two cars moving, of course, naturally would.

Cross-examination:

Q. Mr. Witness, when you set a brake on a car you don't stop it at once if it's a loaded car?

A. No; not at once.

Q. You don't stop a loaded car near so quickly as you do an empty car?

A. No, sir; I do not. You could not very well.

Q. Well, I am speaking of the rule; that's the rule?

A. Yes, sir.

Q. And, with a loaded car, it takes a good while to stop?

A. Well, it depends altogether upon the brake. It's not a good while stopping. It depends entirely on the condition of the brake, although it's in good condition as regards construction. Some brakes don't happen to hold quite as much as others. It depends altogether upon the construction of the brake.

Q. After the brake is set the car runs some distance?

A. Oh, yes. Certainly. Can't stop it instantly.

Q. How long does it take to set up the brake?

A. It depends altogether upon the experience of the man setting it.

124 Q. Take a man of good muscle, like this man; how long?

A. That depends upon the skill; a man skilled would set it up much quicker than some brakemen.

Q. This man (defendant) was an experienced hand, wasn't he?

A. Well, I heard he was.

Q. Told that he was an old brakeman?

A. Yes, sir; I believe so—been braking some time.

Q. He was a man of pretty good muscle, wasn't he?

A. Yes, I should judge so, from his appearance.

Q. How long would it take a man of that kind to set up a brake?

A. Oh, I don't know how long it would take—it shouldn't take over a quarter of a minute.

Q. And if a man was in a hurry it would take less time than if he wasn't in a hurry?

A. Oh, yes.

Q. If he didn't want to stop them very quick he would not be so quick, and, if he wanted to, he could do it even quicker than that?

A. Yes, sir.

Q. Did you ever notice how long a quarter of a minute is?

A. Oh, it might be less than that.

Q. You mean they could do it almost at once?

A. Yes, they would do it very suddenly.

Q. You say you don't remember what you went to the river for?

A. No, I don't—we go down there so often.

Q. You say you don't remember whether you brought up any passengers?

A. No, sir. I can't remember as to that.

Q. You say you don't remember who came up with you from the river, but suppose the crew was on?

A. No, sir; I didn't say that. I know the crew was on.

Q. You don't know whether there was any one else on?

A. I don't remember. Somebody comes up with us nearly
125 every time we come up from there. I know the crew was there.

Q. You say you don't remember whether Herbert went into the office when you did or not?

A. No; I don't remember that he went in.

Q. Your next answer, you say, you don't remember whether you ordered him to set the caboose off?

A. No; I said I didn't remember that. No; I don't remember that I had told him that.

Q. You say you don't remember whether you walked along the train or not?

A. No, I don't; but I usually do.

Q. I am speaking, now, of your memory.

A. That's my answer.

Q. Well, did you speak to Herbert there at that place—at the gap where this was broken?

A. No; I don't know that I did address any conversation directly to him.

Q. Then you have no reason for remembering his presence. He said nothing to you and you said nothing to him?

A. I know he was there.

Q. You answer—notwithstanding you say you didn't speak a word to him, according to your own statement, and he didn't speak a word to you. What is your reason for remembering he was there?

A. Because I saw him there.

Q. Would you remember if he had gone into the office with you?

A. Yes, sir; I would.

Q. You don't remember any of these other six?

A. I know he came into the office with me before I went into the yard.

Q. You say there was not a word said by you to him or he to you?

A. Not that I remember of.

Q. Therefore there was no reason why you should remember that?

126 A. Yes, sir; a very good reason.

Q. What was that?

A. Because I saw him there.

Q. If you did order him to take that caboose and set it on another track, you saw him, didn't you?

A. Yes, sir.

Q. You say you don't remember whether you did or not?

A. No, sir.

Q. I want to know whether there was anything in the world to make you remember whether he was or was not there present, except the fact you saw him?

A. I don't remember; my conversation was with Mr. Quinlan at the car.

Q. If there is any reason why you remember he was there just state it.

A. I know Mr. Herbert came out with me—out of the office. Whether I went to the rear end of the train or not I can't say positive; but I know that we went, or, at least, we came to where those cars were broken. Whether I went direct to them or not I can't say, as there was nearly—it was the seventh car from the hind end.

Q. You have stated over and over again you—he was there. I want to know if there is any reason for your remembering that fact any more than the other facts you have spoken about that you don't remember?

A. The only reason is, I saw him there. I was conversing with Mr. Quinlan at the time; didn't have any occasion to refer to him.

Q. You were talking with Mr. Quinlan at the time?

A. Yes, sir.

Q. Would the fact of your talking with Mr. Quinlan—would that make you remember whether this man was there or not?

A. No, sir.

Q. Is there anything that would make you remember whether he was there or not? If so, tell it.

127 A. Nothing, only the mere fact of my seeing him there and remembering that I saw him.

Q. In other words, you remember you saw him because you remember you saw him?

A. Yes, sir.

Q. The first six questions you just answered before that you didn't remember one of them, did you; how comes it that your memory is so positive on the seventh and so perfectly gone on the rest?

A. Because I have always been——

Q. You are in the employ of this company now?

A. Yes, sir.

Q. Have been how long?

A. Six years.

Q. How far was this from where the engine was—the switch-engine?

A. The switch-engine was the seventh car from the disabled car.

Q. Was it standing there at the time?

A. Yes, sir; attached to them.

Q. Where was Quinlan standing?

A. On the south side of the train, directly opposite to where I stood.

Q. Directly opposite the brake?

A. Directly opposite the brake.

Q. You stood right opposite where this broken car was?

A. Nearly.

Q. The opening was directly between you and Quinlan?

A. I can't say it was directly between me and Quinlan. I was standing there speaking to Quinlan.

Q. Did you see Quinlan when you was speaking to him?

A. Yes, sir.
Q. You saw him through the opening?
A. Yes, sir.
Q. Was this sacked oats or bulked oats?
A. It was sacked.
Q. Was the car perfectly full?
128 A. Yes, sir; they usually are that when you get a car load of oats.
Q. You say they couldn't unload them without they were down at the warehouse. Would there be any great difficulty in unloading the front end of a car load of sacked oats?
A. You could unload it. You would have to unload over half the car.
Q. How far would this draw-bar run back?
A. It runs back, I guess, about six feet from the end of the car, on the under side.
Q. Do you say you would have to unload over half the car?
A. Yes, sir; to get at it.
Q. Why, how far did this draw-bar run back from the front end of the car?
A. It runs back about six feet—the draw-head timbers.
Q. What is the length of a car?
A. Usually about 32 feet or over.
Q. The furthest you would have to take your oats out would be about how far back in the car—about six feet?
A. About six feet from the front end.
Q. Of sacked oats it wouldn't have been a great difficulty to have taken out that many?
A. To take out half a car?
Q. Yes; to take out half a car, where there was danger of human life; anything of that kind.
A. Well, we didn't consider that there was any danger of human life, certainly.
Q. You stated that it couldn't have been unloaded without going to the warehouse, didn't you?
A. Well, if I stated it couldn't have been unloaded without going to the warehouse, I meant that was the destination of it. That's very easily to be seen. It could be unloaded anywhere.
Q. When you cut off these cars did you keep any memorandum of the number of cars you cut off or kicked off?
A. No, sir.
129 Q. You don't do that?
A. I remember them; yes, sir.
Q. I asked you if you kept any memorandum.
A. I don't understand you exactly.
Q. Do you keep any memorandum of the number of cars, when you are switching, that you kick off at a time?
A. No; I don't keep any memorandum, furthermore than referring to the book.
Q. Does the book show the number you kick off at a time?
A. Well, it don't show the number cut off at a time. You can

refer to the numbers, and the numbers in the car book, and cut off the number of cars you want.

Q. I want to know if you make any memorandum, then that would enable you now to say the number of cars you cut off at a time—four or five or six, or less?

A. No, sir; I can't say that I did.

Q. You never keep any memorandum of the number you cut off?

A. No, sir; it's not necessary in the business at all.

Q. You say you gave him no signal to get on this car at all?

A. No, sir.

Q. Is there anything to make you remember whether you did or did not at this time?

A. There was no occasion for it.

Q. I know; but was there anything to make you know whether you did or not?

A. I did not.

Q. Was there anything to make you remember, now, whether you did or did not? Do you understand me?

A. Well, I don't know that there could be any arrangement made by which I could be made to remember more distinctly than the fact [that] I didn't give him any signal, and it wasn't necessary.

Q. But what I want to know now, Mr. Witness, is, is there anything to refresh your memory as to that fact so as to make
130 you remember whether you did or did not?. You understand me well enough. State, please, any special reason—any particular thing—to make you remember you did or did not. There was nothing extraordinary in the fact of those three cars going down the main line; there was nothing extraordinary at all about it; it's a common, every-day occurrence, right straight along during the day.

A. There would be no particular reason for giving him a signal to stop those particular cars.

Q. That's all that makes you remember it?

A. That's all.

Q. Isn't it customary to give signals in such circumstances, or in others?

A. No, sir; not necessary.

Q. But is it not customary?

A. No, sir; it's not customary.

Q. Isn't it very often done?

A. Yes, sir; it is very often done. The cars were going pretty fast, and he went on them.

Q. He wasn't on those cars at first, was he?

A. He wash't on them when they started.

Q. There was nothing in any of these things to make you remember at this distant period more than what there ordinarily is in any such transaction?

A. No.

Q. That's what I supposed.

A. Well, that thing occurring on those three cars, of course it's very vividly impressed on my mind—in fact, everything.

Q. Wouldn't it rather make you forget than otherwise, seeing this man hurt? When you saw this man hurt and mashed up in this way would that cause you to go right back to the other things, or would that call your attention and take your attention away from the other things?

A. It would at the time. It wouldn't have the effect to make me forget everything I had previously known.

Q. It wouldn't make you remember little matters of minor importance just before that, would it?

131 A. If anything, I should think it would have a tendency to sharpen my memory of it. I would naturally review those matters, how it occurred.

Q. Would the fact whether you had ordered him to go on those cars—how could that have any effect at all? How would that make you remember it?

A. I don't know as it would make me remember more distinctly. I know I didn't have any occasion to order him to go on the cars.

Q. But you say they do often do it?

A. I told you if they had given the cars too much of a start he would know by the impetus of the cars whether I had given them too much of a start or not.

Q. Didn't those cars come together pretty hard when they struck that day?

A. Not hard enough to do any damage to the car.

Q. A car would strike very hard without doing any damage to the car, wouldn't it?

A. Yes, sir.

Q. Wasn't this something that could be heard way down town?

A. It's nothing more than ordinary. You hear switching every day; make a great deal of noise at times.

Q. Make everything ring, striking?

A. Yes, sir.

Q. Isn't it a fact that the cars struck together hard?

A. Not hard enough to do any damage to the cars.

Q. They did strike pretty hard?

A. As I told you, not hard enough to do any damage to the cars. Consequently I didn't have to give him any signal.

Q. If it was needed you would have given him the signal?

A. If I was going to give him the signal I would have given it to him time enough to prevent their striking—if I thought they were going to do any damage.

132 E. D. POMROY recalled, testifies as follows:

Q. Mr. Pomroy, if this N. P. car with the step brake on and one or more cars were set off and set in motion, and the brake was to be set in the ordinary way upon the step car, what effect would that have upon the damaged car?

(Objected to, as immaterial, incompetent, and irrelevant, and objections overruled by the court; to which ruling the plaintiff excepts.)

A. The cars would naturally go together.

Q. Come together?

A. Certainly—if I understand you rightly, and I guess I do—of course there would be. If there was no brakes set on the hind cars, why the heft of those two cars coming would come right on to that brake, and no draw-head there, that would let the cars come together. Setting the head brake, the cars would jam down onto that.

Q. Supposing the brake was put on enough to slacken the speed of that freight car, what effect would that have?

A. Well, to slacken the speed, of course. The others would catch up to it—they would go until they came against the other car.

Q. They would come together under those circumstances?

A. Yes, sir.

Q. Then the only difference would be if it was stopped suddenly they would come together harder?

A. Certainly; that's my theory of it.

133 JOHN DAVIDSON, being called as a witness on the part of the defendant and first duly sworn, testifies as follows:

Q. Mr. Davidson where do you reside?

A. In Bismarck.

Q. How long have you resided in Bismarck?

A. Six years past.

Q. What is your business?

A. I am agent of the Northern Pacific Railroad Company.

Q. Do you know the plaintiff, Mr. Herbert?

A. I know Mr. Herbert.

Q. Was you at Bismarck at the time of his injury?

A. I was at Bismarck, at the river, that afternoon.

Q. Did you see him after his injury?

A. Frequently.

Q. State what, if any, conversation you had with Mr. Herbert in regard to the injury after the injury.

A. Well, our conversations with regard to it were very general—in a general way. I visited him frequently, seeing whether he was tended to in the various ways he needed, asking him if he had anything to suggest.

Q. I mean with special reference to the occasion of the injury; what occasioned the injury.

A. We talked it over in half a dozen different ways. I can't recollect all the conversation we had; neither can he, I suppose.

Q. Was there any conversation between you with reference to knowledge of the broken condition of the cars? If so, state that.

A. I don't know. There was no such conversation between him and me as to my asking him if he knew the condition.

Q. State what there was bearing upon it.

A. I presumed from the conversation between us that he did know. I said to him one night, or some time I was in there,

134 "Knowing the condition of these cars, Dick, how did you come to put yourself in that position?" He never admitted to me he knew it.

Q. What did he say to that?

A. He said, "I can't account for it." That's all the conversation I can recollect on that point; that's the whole of the conversation I had with him.

Q. What was the question you put to him?

A. In the course of the conversation I made use of the expression, "Dick, how did you come—how did you come to put yourself in that position, knowing the condition of the cars?" Assuming, as I say, from his conversation, I did, that he did know, he said, "I can't account for it."

Q. That was his reply; he couldn't account for it?

A. That was his reply; that he couldn't account for it. That was his reply in so many words. I had several other conversations that didn't turn on his knowledge. I assumed that he knew.

Q. From the talk you didn't suppose anything else?

A. That was what made me make the remark to him. I didn't see him until he had been carried in and attended to by the doctor. I was at the river. Didn't come up till late. It was after 6 o'clock, I guess, when I got back to Bismarck.

Cross-examination:

Q. About how long was this conversation—this particular conversation—after the injury to Herbert?

A. It was some time between the time he was injured and the time the leg was amputated; when he was beginning to feel very doubtful about saving the leg. I don't know exactly how long.

Q. You live here—have lived here some time?

A. I have lived here over six years.

Q. You know this man Quinlan to whom the last witness, this yard-master, referred?

A. Yes, sir.

Q. Where does he live; in town?

135 A. Yes, sir.

Q. Is he an employé of the company?

A. He is car repairer.

Q. Is still?

A. Still has the position he had at that time; is still; yes, sir.

Defendant rests.

Rebutting Evidence for Plaintiff.

PATRICK QUINLAN, being called as a witness on the part of the plaintiff, testifies as follows:

Q. Mr. Quinlan, you heard the yard-master here testify, did you? You know who he is, at any rate?

A. Yes, sir.

Q. Gilboy?

A. Yes, sir.

Q. Did you hear him or didn't you?

A. Yes, sir.

Q. You heard, then, his statement as to the conversation which

he had at that broken car with you, at which time he alleged that Herbert was present; you heard his testimony as to that?

A. Yes, sir.

Q. Did you see Herbert there at that time?

A. No, sir.

Q. Did you see Herbert there at that time—at any conversation with him?

A. No, sir.

136 Cross-examination:

Q. You had a conversation with Mr. Gilboy about that car, did you?

A. I told him about the condition of it; yes, sir.

Q. You had a conversation right there at the car, was it not?

A. Yes, sir.

Q. On which side of the train was you?

A. On the south side.

Q. Which side was Gilboy?

A. On the north side.

Q. Was Gilboy standing in front of the opening between the train?

A. Yes, sir.

Q. Did you state to Gilboy that it would be necessary to unload the car, or part of it, in order to have it repaired?

(Objected to, as incompetent and not cross-examination, and objections sustained; to which ruling of the court defendant excepts.)

Q. How long did you remain there in conversation with Mr. Gilboy, Mr. Quinlan? How long were you there?

A. A few minutes only.

Q. Were you there when Mr. Gilboy came up?

A. No, sir; I don't think I was.

Q. You came up after he came up, did you?

A. Yes, sir.

Q. When you came you found him at this damaged car?

A. I think he was there; yes, sir.

Q. Was you going along the opposite side of the car examining the train?

A. No, sir; I had looked the train over before.

Q. You were, then, simply examining this broken car?

A. No; I wasn't simply examining it; I came there with the intention of telling him about it.

Q. You was on the south side of the train?

A. Yes, sir.

137 Q. How near the east end of the train?

A. I don't know; I didn't count the cars.

Q. How far could you see up and down the train, on the opposite side of the train, from where you were?

A. See on the same side?

Q. No, sir; on the opposite side.

A. Couldn't see any.

Q. To see anybody they would have to stand right in front of the opening?

A. Yes, sir.

Q. This plaintiff might have been standing two or three, a couple of feet, one way or the other, from Mr. Gilboy, and you would not have seen him?

A. No; I would not have seen him.

Q. Did you repair that car?

A. Yes, sir.

Q. Did you give any instructions about unloading it?

(Objected to, as immaterial, incompetent, and not cross-examination, and objections sustained; to which ruling of court defendant excepts.)

L. N. GRIFFIN, being called as a witness on the part of plaintiff, and first duly sworn, testifies as follows:

Q. Mr. Griffin, where do you live?

A. At Bismarck.

Q. How long have you lived there?

A. About eight years.

Q. You are the deputy sheriff here?

A. Yes, sir; I am.

Q. Do you remember the circumstance of the injury to Mr. Herbert?

A. I do.

Q. Were you in Bismarck at the time?

138 A. I was.

Q. Did you take him off at the time he was injured?

A. I helped take him off.

Q. Pulled him out from between the cars?

A. Yes, sir; pulled the cars apart.

Q. How many cars were there dropped down at the time that he was braking on?

A. There was the one he was on, the car with the step brake on, and one car on the other side of him.

Q. East of him?

A. East of him, and some cars west.

Q. Was there more than one car east of him at that time?

A. No, sir.

Q. Are you certain of that?

A. Yes, sir. I saw one car; that is, one car that was against the car he was on. There might have — cars up quite a ways.

Q. You say there was one car against the car he was on?

A. Yes, sir; the same as he was here, and there was another car the other side of him.

Q. In other words, there was two cars, between which he was?

A. Yes, sir; he was on one.

Q. There was but one car pressing upon the one upon which he was?

A. Yes, sir; that was all.

Q. You are sure of that?
A. Yes, sir.
Q. What effort had you to make to get him out?
A. There was, maybe, 15 or 20 men took hold to push the cars apart. I crawled up on top and took hold of him, and lifted his leg up, and somebody—Mr. Maldon, I think it was—helped me. We took hold of him.

139 HENRY HOFFACKER, being called as a witness for plaintiff, and first duly sworn, testifies as follows:

Q. Mr. Hoffacker, where do you live?
A. At Mandan.
Q. That's here west?
A. West of the Missouri river.
Q. What is your business?
A. I am employed at present as locomotive engineer for the Northern Pacific.
Q. How long have you been with the Northern Pacific?
A. Two years since the eleventh of May, 1879.
Q. Were you here at the time Herbert was hurt?
A. I was on the switch-engine in the Bismarck yards.
Q. You were engineer at that time?
A. Yes, sir.
Q. By the way, do you know or do you not know—do you remember or do you not—how many cars there were dropped down—kicked down—at that time? I have reference now to the cars on top of which Herbert was when he was hurt.
A. I don't know anything about it, sir.
Q. You don't remember whether there were two or more?
A. That's out of my line. I couldn't tell whether he cut off one car or ten. I am subject to the yard-master's orders.
Q. Did you go down when he was hurt to where he was?
A. I went down to the car. I could not tell how many cars there were. I didn't look.
Q. You remember seeing him there where he was, in between two cars?
A. He was taken off when I went there.
Q. Did you notice, Mr. Hoffacker, the car on which he was hurt—did you notice any blood?
A. I didn't go up on top at all.
Q. Did you notice so that you knew the car on which he stood when the accident occurred?

140 A. No, sir; I did not.
Q. You don't know?
A. No.
Q. You were down to the river on this switch-engine, were you not, Mr. Hoffacker?
A. Yes, sir; we were down to the river.
Q. Were down at the time Herbert and the yard-master were. You were on the engine, were you not?
A. I was.

Q. Now, you may state about your coming up, what was done, and so forth.

A. Well, I haven't got much to state. Only this much: That we went down to the river after dinner, some time. I couldn't tell just what time. I suppose it was about 1 o'clock when we left the yard here. While we was down to the river this freight came in. When we came back we had some passengers in a box car that were to be unloaded somewhere on the platform there. So they were unloaded on the platform there. Gilboy jumped off one side of the engine. He says to Dick, "Unload those passengers and throw that caboose. I will get the numbers and we will switch this freight train." Gilboy—that's the yard-master—he says, "Throw off the caboose on the caboose track." Have a track on purpose to throw cabooses on.

Q. And he told him also to unload the passengers?

A. Yes, sir; unload the passengers. He would get the numbers of the train, and they would switch the train, and we threw the caboose off while Ed. was getting the numbers and coupled the engine back onto the train. What happened after that I don't know anything about it; I was going according to directions.

Q. Did Dick unload those passengers?

A. I don't know as he did. They got off themselves. Stopped the car in front of the depot, and they got off.

Q. You didn't notice whether there was a plank gotten out to help some of them out?

A. No, sir; it was in a box car.

141 Q. You say he went out and hitched onto the caboose, and we threw the caboose; that is, he and you together?

A. Yes, sir.

Q. He was with you, then?

A. Yes, sir.

Q. How soon did Hoffacker—I believe that's the yard-master's name——

A. That's my name.

Q. No, Gilboy; how soon did he come to where you was?

A. He didn't come to where we was at all.

Q. How long did Dick remain there?

A. I couldn't say; long enough to throw the caboose onto the track and couple on the train. He coupled the engine onto the train after we threw the caboose onto the caboose track.

Q. What did you do then?

A. Went on to switch the train, then, according to the rules of the yard.

Q. Did you go to switching the cars at once to where they belonged?

A. We did, sir.

Q. Did you do it at once?

A. We did it. I don't know as we done it at once, but as soon as Gilboy got his numbers and gave his orders we were waiting for him.

Q. What do you mean by we were waiting—who?

A. The men all waited; the engine and myself.

Q. Do you remember where Herbert was?

A. I don't know exactly where he was; whether he was on the engine or on the ground, or where he was. I didn't pay any attention to that. That wasn't my business.

Q. If you had been waiting there, having nothing to do, would you or would you not have noticed?

A. I probably would have been asleep. I never pay attention to anything without orders.

Q. You look sometimes without orders, don't you?

A. It's according to what I am looking at.

142 Q. Did you observe Mr. Herbert at that time back with the yard-master?

A. I did not.

Q. You did not?

A. No, sir; I didn't see him and the yard-master together.

Cross-examination:

Q. You don't know where Herbert went after the engine was coupled back on the train?

A. I do not.

Q. Where did you first see the yard-master, Gilboy, after that?

A. I saw him at the switch giving signals after he got the numbers.

Q. How far from you was the switch then?

A. Probably four or five cars.

Q. At the time, the first time you saw him then, he was giving signals to you about moving the train?

A. Yes, sir.

Q. Did you see him come out of the office?

A. No, sir.

Q. See where he came from?

A. No; I didn't see where he came from at all. I don't know anything about it. The engine was headed east; that would put me on the south side of the train. The depot was on the north side of the train. I couldn't tell where he came from.

Q. You couldn't see anything, then, on the north side of the train, or anybody?

A. No, sir; nothing at all what happened on the north side.

Q. Couldn't see what was going on on the north side of the train?

A. No, sir.

Q. Whether Herbert and Gilboy was together there—you was not where you could see, if they had been?

143 A. I couldn't see anything on the north side of the train.

Q. Where was the switch—on which side of the train?

A. On the south side of the train.

Q. Did you see Gilboy come around from the north side?

A. I said I didn't see where he came from. The first notice I had of him was he was there giving me the signal; he might have come around, or might have crawled under, or come over the top; he was there when I first saw him.

Redirect examination:

Q. Before he went in to get the numbers of the cars he gave directions for him to go and cut off the caboose?

A. Yes, sir.

Q. And he went with you at that time to cut off the caboose, and after it was cut off he hitched on or coupled onto the train?

A. Yes, sir.

C. D. HERBERT, being recalled, testifies as follows:

Q. You heard the testimony of the yard-master, Mr. Herbert?

A. I did, sir.

Q. You heard his statements in regard to a conversation which he said he had in your presence with Mr. Quinlan?

A. Yes, sir.

Q. Did you ever, before he stated that on the stand, hear such a conversation?

A. No, sir.

Q. Were you present at any time when he was talking with Mr. Quinlan there, at or near these cars?

A. No, sir; I never saw Quinlan; I was in there and changed my clothes at noon in Quinlan's shop; I never saw Quinlan afterwards until he came up; I —— be positive whether he came up or not; I think he came to my room and saw me after I was hurt; never saw him before that.

144

Q. You heard the testimony of Mr. Davidson?

A. Yes, sir.

Q. Do you remember anything about a conversation such as he repeats?

A. No, sir; I do not; I couldn't say; if I said so I don't remember.

Q. Did you ever, consciously or knowingly, tell anybody in the world, or admit to anybody, that you knew—tell any one, or admit to any one, that you knew when you went onto those cars that they were in a damaged condition or dangerous—that you knew when you went on, or when you was on, or before?

(Objected to, as immaterial, incompetent, and irrelevant, and objection sustained; to which ruling of the court plaintiff excepts.)

Q. Was that the fact, that you did, when you were on, or at any time before that, know of that injury; did you have any knowledge at the time you were on the car, or at any time previous to it, that those cars were broken or defective?

(Objected to, as being a repetition of the same matter upon which the witness testified and was examined in chief, and objections overruled; to which ruling of the court the defendant excepts.)

A. No, sir; I did not.

Q. The yard-master stated that you was in the office while he was getting these numbers; is that true, or is it not?

A. It's not so; it's not true; he told me to go and set the caboose out, and I did it.

145 JOHN WALDON, being called as a witness for the plaintiff and first duly sworn, testifies as follows:

Q. Mr. Waldon, how long have you lived at Bismarck?
A. Six years.
Q. What is your present position here now?
A. City marshal.
Q. Do you remember the day upon which Mr. Herbert, the plaintiff in this case, was injured on the track down here?
A. I don't remember the day of the month.
Q. Do you remember the time—the occurrence?
A. Yes, sir.
Q. Were you present at the time or about the time?
A. I was standing on Front street when he was struck.
Q. I believe you was one of the parties who helped carry him away?
A. Yes, sir.
Q. State, Mr. Waldon, how many cars were east of him as he stood between the train there.
A. There was one car east of the car he was on.
Q. Describe that car, if you can, by any particular defect.
A. I didn't take no notice of the number on it—it was a car that the draw-head was out.
Q. There was one car east of him that had the draw-head out, and only that car?
A. Yes, sir; that was all.
Q. You helped pull it back, did you?
A. Yes, sir; I helped shove it away.

Question by JUROR: You say there was one car to the east of the gap that he was caught in?
A. Yes, sir; the car east of him was the one that crushed him.

146 Question by attorney for plaintiff: Was that the car that the draw-head was out of?
A. Yes, sir.
Q. Was there any car east of that?
A. No, sir; not on that switch.

Cross-examination:

Q. You don't know anything about the description?
A. I don't know anything about the numbers.
Q. How far did you shove these cars?
A. Just far enough to take him out from between the two cars.
Q. That would be five or six inches?
A. We shoved it about five or six feet. It went that far before it stopped. There was five or six men ketched the car. L. N. Griffin was one of them. As soon as he stopped he jumped up on the car and ketched him.

(Defendant waives all objections to all instructions to the jury being read by the court to the jury and not by counsel.)

CLAYTON D. HERBERT
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

I hereby certify that the foregoing is a correct and complete transcript of all the testimony offered upon the trial of the above-entitled cause, at Bismarck, in the county of Burleigh, June 1 and 2, 1881, as reported and transcribed by me.

ED. L. BISHOP,
Official Stenographer of Third Judicial District of Dakota.

Fees, 413 folios, at 15c., $61.95.

147 At the close of the evidence the defendant requested the court to instruct the jury as follows:

"The counsel for the defendant ask the court to charge the jury that the evidence is not sufficient to warrant a verdict for the plaintiff, and that the verdict must therefore be for the defendant."

But the court refused to so charge the jury, and the defendant then and there duly excepted to the ruling of the court.

The defendant's counsel thereupon requested the court to further charge the jury as follows:

"If the use that was made of the car after the breakage was without the knowledge or authority of the defendant, the plaintiff cannot recover, and knowledge on the part of the yard-master is not sufficient to charge the defendant with knowledge."

But the court refused to so charge the jury, and the defendant then and there duly excepted to the ruling of the court.

The defendant's counsel thereupon requested the court to further charge the jury as follows:

"If the plaintiff himself knew, or had reason to know, of the broken and defective condition of the car before the accident to him, he cannot recover."

But the court refused to so charge the jury, and the defendant then and there duly excepted to the ruling of the court.

The defendant's counsel thereupon requested the court to further charge the jury as follows:

"If the accident to Herbert resulted from the yard-master or car repairer negligently omitting to notify Herbert of the broken condition of the car, in that case the defendant was not responsible for the injury which Herbert received."

But the court refused to so charge the jury, and the defendant then and there duly excepted to the ruling of the court.

148 The defendant's counsel thereupon requested the court to further charge the jury as follows:

"From the evidence in this case it appears that the broken car No. 1804, shortly before the accident, had arrived in the company's yard at Bismarck, from a journey over the railroad; that such cars are liable, from ordinary use and travel upon the railroad, to become

broken in the place and manner wherein this car had been broken. It further appears that the plaintiff had, prior to the accident, had some experience in, and knowledge of, the management of trains of cars, and must be presumed to have known that such cars were liable to such accidents. Hence it was the duty of the plaintiff to take care not to expose himself to the perils of being hurt by cars so broken. His exposure of his limbs to be hurt in such a way was negligence on his part, and prevents his recovery of damages for the injuries which he received."

But the court refused to so charge the jury, and the defendant then and there duly excepted to the ruling of the court.

The defendant's counsel thereupon requested the court to further charge the jury as follows:

"It appears from the evidence in the case that cars reaching the terminus of the railroad at Bismarck in a broken and disabled condition have always been one of the ordinary incidents of operating defendant's road; that cars should reach the company's yard at Bismarck in a broken and disabled condition, and that such cars might do injury to the company's employés at that yard unless such employés should take special care to prevent such injuries, have, therefore, always been ordinary perils of the business in which the plaintiff was engaged at the time he was hurt. Hence, as it does not appear that the plaintiff took any or particular care to avoid injury from such peril, he cannot recover in this action."

But the court refused to so charge the jury, and the defendant then and there duly excepted to the ruling of the court.

149 The defendant's counsel thereupon requested the court to further charge the jury, as follows:

"It does not appear from the evidence in the case that the placing of the plaintiff's limb between the two cars in question was a necessary part of his duty as brakeman in the defendant's yard, nor that the placing of his limb in that position was necessary to the stopping or checking of the said cars, as they were being moved when the plaintiff was hurt. Hence, the placing by the plaintiff of his limb in such position must be regarded as his own voluntary act, and the company is not responsible therefor."

But the court refused to so charge the jury, and the defendant then and there duly excepted to the ruling of the court.

The defendant's counsel thereupon requested the court to further charge the jury, as follows:

"The plaintiff cannot recover from the defendant by the reason of any acts of negligence on the part of any other persons employed by the defendant in the same general business with plaintiff. This would include the yard-master and car repairer."

But the court refused to so charge the jury, and the defendant then and there duly excepted to the ruling of the court.

At the request of defendant's counsel, the court granted the

following instructions to the jury, which were thereupon read to the jury:

"If the defect complained of in the car No. 1804 was caused by breakage, as the car with a loaded train was approaching Bismarck, and it was attached by a chain to another car, and only used in that condition to bring it into Bismarck and to a place for unloading, preparatory to repairing, such use of the broken or defective car was not negligence or want of ordinary care on the part of the defendant, and would not entitle the plaintiff to recover.

"As cars are liable to accident while in use, and to come into
150 the station yard in a damaged condition, the risks incident to the handling of such cars in the yard, preparatory to unloading them, is an ordinary risk incident to the business of a brakeman, and the company is not liable for an injury resulting therefrom in the usual or ordinary handling of such cars.

"If the plaintiff, either from the unusual appearance of the car—as, for instance, its being attached to the next car by chains—or from any statements of the yard-master or car repairer, had reason to suppose the car in question was defective or had been broken, it was his duty to take care not to expose his person to injuries which a broken and defective car might cause.

"If a good-working brake on the car which was attached to the disabled car by chain would not have prevented the accident to the plaintiff, the fact that it was out of working order will not entitle the plaintiff to recover.

"If you find that the chain of the brake on car 1804 was broken when Herbert attempted to use it, at the time he testifies he attempted to use it; and if there is no evidence to show that this chain was defective when put in, or that when the car left Fargo on its travel to Bismarck the said defect could have been discovered by the exercise of ordinary care, or that such care was not used—then you cannot find that the defendant was negligent in the use of the said brake at the time the plaintiff attempted to use it.

"If the jury believe the evidence of Gilboy, that statements were made by him, in presence and hearing of plaintiff, that the car was broken, and that it should be taken out and repaired, that was sufficient notice to the plaintiff that the car was defective, and he was bound to take care not to expose his person to injury on account of such defect."

The above exceptions examined and allowed.

S. A. HUDSON, *Judge.*

151 The court, upon the request of the plaintiff, granted the following instructions, which were read to the jury:

"He who engages in the employment of another for the performance of specific duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, including the perils arising from the carelessness and negligence of those who are in the same employment. But there are exceptions to the rule, one of which is that the master, whether a natural person or a corporate body, should use

due care not to expose the servant when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

"To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery and other instrumentalities adequately safe for use by the latter. It is implied in the contract between master and servant, and public policy requires that in selecting the means and machinery in conducting his business the master shall not be wanting in proper care. His negligence in providing, or in failing to keep in suitable condition, such machinery is not a hazard usually or necessarily attendant upon the business; nor is it one which the servant, in legal contemplation, is presumed to risk.

"There is a legal obligation upon railroad companies to exercise reasonable care, not only to provide, but to maintain in suitable condition the machinery and apparatus to be used by its employés; and this obligation is the more important and the degree of diligence in its performance is the greater in proportion to the damages which may be encountered; and the negligence of those entrusted by the corporation with the power and duty of procuring or keeping in repair such machinery is, in law, the negligence of the corporation.

"Where a servant is employed on machinery, from the use
152 of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur.

"If the plaintiff was careless, heedless, or negligent at the time injury occurred, and such carelessness, heedlessness, or negligence materially contributed to the injury, he cannot recover.

"If the jury find for the plaintiff they should award him as damages such a sum as in their judgment will reasonably indemnify him for the loss or injury caused by the defendant's want of ordinary care charged in the complaint, and which caused the injury.

"That it is for the jury to find whether there were not other acts of negligence on part of the defendant contributing to plaintiff's injury than the defect in car No. 1804, and in that event the jury should find for the plaintiff if plaintiff was free from negligence."

To the said instructions the defendant's counsel duly excepted, as follows:

I.

The defendant excepted to so much of the said charges as were in the words following:

"He who engages in the employment of another for the performance of specific duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, including the perils arising from the carelessness and negligence of those who are in the same employment. But there are exceptions to the rule, one of which is that the master, whether a natural person or a corporate body, should use

due care not to expose the servant when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master."

153 II.

The defendant further excepted to so much of the said charges as were in the words following:

"To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery and other instrumentalities adequately safe for use by the latter. It is implied in the contract between master and servant, and public policy requires, that in selecting the means and machinery in conducting his business the master shall not be wanting in proper care. His negligence in providing, or in failing to keep in suitable condition, such machinery is not a hazard usually or necessarily attendant upon the business; nor is it one which the servant, in legal contemplation, is presumed to risk."

III.

The defendant further excepted to so much of the said charge as were in the words following:

"There is a legal obligation upon railroad companies to exercise reasonable care, not only to provide, but to maintain in suitable condition, the machinery and apparatus to be used by its employés; and this obligation is the more important, and the degree of diligence in its performance is the greater, in proportion to the damages which may be encountered; and the negligence of those entrusted by the corporation with the power and duty of procuring or keeping in repair such machinery is, in law, the negligence of the corporation."

154 IV.

The defendant further excepted to so much of the said charge as were in the words following:

"Where a sorvant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur."

V.

The defendant further excepted to so much of said charge as were in words following, that is to say:

"That it is for the jury to find whether there were not other acts of negligence on the part of the defendant contributing to plaintiff's injury than the defect in car No. 1804; and in that event the jury should find for the plaintiff if plaintiff was free from negligence."

The foregoing exceptions examined and allowed.

S. A. HUDSON, *Judge.*

The court, of its own motion, instructed the jury as follows:

"GENTLEMEN OF THE JURY:

"This case is now about to be submitted to you for your careful consideration of the evidence which has been given upon the trial, and your verdict, after such consideration under the law, as it should be given you by the court.

"This action has been brought by the plaintiff against the
155 defendant, The Northern Pacific Railroad Company, to recover damages for an injury received by the plaintiff while in the employ of the defendant.

"The issue has been greatly narrowed and simplified by the pleadings, in which the defendant admits that the plaintiff was injured at the time and place alleged and while in the employ of the defendant, but denies its liability for damages on account of said injury by reason of any negligence, omission, or misconduct on its part, and alleging in their answer that the plaintiff was guilty of such negligence on his part, which contributed to said injury, that the defendant is absolved and exonerated from all liability.

"The defendant in this action is not to be made liable for injuries suffered by one of its employés solely through the carelessness or negligence of another employé of the defendant engaged in the same general business. The liability to injury from such a source is one which such employé takes upon himself when engaging with others in the service of a common master. It is a hazard incident to the nature of the engagement into which he enters.

"The ground on which the law recognizes liability on the part of the defendant is that which arises from personal negligence, or such want of care and prudence in the management of its affairs or the selection of its appliances and machinery, the omission of which caused the injury and which, if they had exercised, would have averted it.

"We are not now dealing with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported over their road for a compensation, and in regard to whom they became absolute insurers against all defects which the highest degree of vigilance could detect or provide against.

"The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an injury to an employé, and depends for its foundation upon some failure or neglect in the railroad company to provide proper machinery and apparatus.

156 "But if you find from the evidence that the defendant was guilty of negligence in not providing proper and safe machinery and appliances in consequence, of which neglect the injury was received, still, if the plaintiff failed to exercise that prudence, care, and caution which a prudent man, under similar circumstances, ordinarily would exercise, which contributed approximately to the injury, he is not entitled to recover.

"But I charge you, gentlemen, that the negligence on the part of the plaintiff which would preclude him from a recovery of damages

must be the actual proximate cause contributing, to some extent, directly to the injury, and not a mere technical wrong contributing either incidentally or remotely or not at all towards it.

"If you find from the evidence that the plaintiff is entitled to recover in this action, the next question for you to consider will be the amount of damages which he is entitled to recover. These damages cannot be proved or computed in dollars or cents, but they are to be estimated. And, for the purpose of estimating such damages, you may take into consideration the loss of time and employment the plaintiff has sustained up to the time of this trial, and the probable loss in the future; also, his physical and mental suffering; and from all these considerations find some definite sum which, in your judgment, under all the circumstances, he ought to recover for this injury.

"If you find for the plaintiff, your verdict will be: 'We, the jury, find for the plaintiff' such definite sum as you shall agree upon.

"If you find for the defendant: 'We, the jury, find for the defendant.'

"Gentlemen, take the case and do justice by the parties."

157 To the said instructions the defendant's counsel duly excepted, as follows:

1.

The defendant excepted to so much of the said charge as was in the words following, that is to say:

"The defendant in this action is not to be made liable for injuries suffered by one of its employés solely through the carelessness and negligence of another employé of the defendant engaged in the same general business."

2.

The defendant excepted to so much of the said charge as was in the words following, that is to say:

"The ground on which the laws recognize liability on the part of the defendant is that which arises from personal negligence, or such want of care and prudence in the management of its affairs, or the selection of its appliances and machinery, the omission of which caused the injury, and which, if they had exercised, would have averted it."

3.

The defendant further excepted to so much of the said charge as was in the words following, that is to say:

"The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an injury to an employé, and depends for its foundation upon some failure or neglect in the railroad company to provide proper machinery and apparatus."

158 4.

The defendant further excepted to so much of the said charge as was in the words following, that is to say;

"But if you find from the evidence that the defendant was guilty of negligence in not providing proper and safe machinery and appliances, in consequence of which neglect the injury was received; still, if the plaintiff failed to exercise that prudence, care, and caution which a prudent man, under similar circumstances, ordinarily would exercise, which contributed approximately to the injury, he is not entitled to recover. But I charge you, gentlemen, that the negligence on the part of the plaintiff which would preclude him from recovery of damages must be the actual proximate cause contributing, to some extent, directly to the injury, and not a mere technical wrong contributing, either incidentally or remotely, or not at all, towards it."

5.

The defendant further excepts to so much of the said charge as was in the words following:

"If you find from the evidence that the plaintiff is entitled to recover in this action, the next question for you to consider will be the amount of damages which he is entitled to recover. These damages cannot be proved or computed in dollars or cents, but they are to be estimated. And, for the purpose of estimating such damages, you may take into consideration the loss of time and employment the plaintiff has sustained up to the time of this trial, and the probable loss in the future; also, his physical and mental suffering; and from all these considerations find some definite sum which, in your judgment, under all the circumstances, he ought to recover for his injury."

The foregoing exceptions examined and allowed.

S. A. HUDSON, *Judge.*

159 I hereby certify that the foregoing bill of exceptions has been by me examined and allowed, and that the same contains a true and correct statement of all the evidence given, and exceptions taken in regard to the admission or rejection of the same, upon the trial of said cause, and that it also contains a true copy of each and all the instructions to the jury, given or refused, together with the exceptions taken to the refusing or giving of such instructions upon said trial.

S. A. HUDSON, *Judge.*

Dated September 14, 1881.

TERRITORY OF DAKOTA:

Burleigh County District Court.

CLAYTON D. HERBERT, Plaintiff,

against

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Please take notice that at the court-room in the court-house, in Fargo, in the county of Cass, in said Territory, at 10 o'clock in the forenoon on Thursday, July 21, A. D. 1881, or as soon thereafter as counsel can be heard, the defendant in the above-entitled suit will move the court aforesaid that the verdict heretofore rendered in said action against the said defendant be set aside and vacated, and that a new trial of said action be granted, upon the grounds following, that is to say:

First. That the damages awarded by the jury by such verdict were greatly excessive, and appear to have been given under the influence of passion or prejudice.

Second. That the evidence adduced upon the trial was
160 insufficient to justify such verdict, and such verdict is contrary to law.

Third. That the court committed sundry errors of law, to the detriment of the defendant, upon the trial, all of which were duly excepted to by the defendant.

Such motion will be made upon the bill of exceptions in said case, to be hereafter presented to and settled by the court, and upon all the pleadings, papers, and records of proceedings therein.

W. P. CLOUGH,

Dated July 7, 1881. *Attorney for Defendant.*

To Messrs. WILSON & BALL and THOMAS WILSON,

Attorneys for Plaintiff.

TERRITORY OF DAKOTA:

District Court for Burleigh County.

CLAYTON D. HERBERT

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

A motion having been duly made by the defendant in the above-entitled action to set aside the verdict and for a new trial, and the said motion having been brought on for argument before this court, W. P. Clough, Esq., appearing for the motion, and Messrs. Wilson & Ball and the Hon. Thos. Wilson, attorneys for the plaintiff, opposing, and after hearing the arguments of counsel, and after due consideration, ordered that the said motion be granted, unless the attorneys for the plaintiff shall at once, by written stipulation filed in this cause, remit $15,000 of said verdict found by the jury on the
161 trial therein; but in case the said attorneys for the plaintiff shall file said stipulation remitting $15,000 of said verdict, then, in that case, said motion for a new trial be denied, and judg-

ment for $10,000 upon said verdict be entered therein according to law, with costs.

(By the court:) S. A. HUDSON, *Judge.*

Dated September 17, 1881.

District Court in and for Burleigh County, Dakota Territory.

CLAYTON D. HERBERT
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

Whereas upon motion of defendant for new trial in above-entitled cause, heard on the fourteenth day of September, A. D 1881, at the court-house in the city of Fargo, Cass county, D. T., before Hon. Sanford A. Hudson, judge of said county, it has been ordered by the court that a new trial be granted in said cause unless the plaintiff remit $15,000 of the verdict found in said cause: Now comes the plaintiff, and, in pursuance of said order of the court, offers to and does hereby remit $15,000 of the said verdict, and consents that the said verdict stand at $10,000, and that plaintiff have judgment for that amount, together with the costs of the action.

Dated September 17, 1881.

THOMAS WILSON AND
WILSON & BALL,
Plaintiff's Attorneys.

C. D. HERBERT, *Plaintiff.*

162 TERRITORY OF DAKOTA,
Third Judicial District, County of Burleigh:

At a general term of the district court within and for the county of Burleigh, in the said district, held at the court-house in the city of Bismarck, in said county, on the fourth day of June, 1881.

Present: The Honorable Sanford A. Hudson, judge.

Judgment for Plaintiff on Trial by Jury.

CLAYTON D. HERBERT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This action having been tried by a jury at a general term of the district court for Burleigh county, held at the court-house in Bismarck, on the fourth day of June, A. D. 1881, before the Hon. Sanford A. Hudson, judge, and the said jury, after hearing the evidence, the argument of counsel, and instructions of the court, retired, and thereafter returned into court a verdict in said cause for said plaintiff, and against said defendant therein, for the sum of $25,000, and said verdict having been entered in the minutes of the court; and whereas, upon a motion by defendant for a new trial in said cause, argued and heard at Fargo, the fourteenth day of September, 1881, before the Hon. Sanford A. Hudson, it was ordered by the court that a new trial be granted or allowed defendant unless the

plaintiff would at once remit $15,000 of the said verdict; and whereas the plaintiff has offered to, and has, remitted $15,000 of the said verdict, and filed his remission thereof in writing
163 with the clerk of the court this day: Now on motion of Wilson & Ball, of counsel for plaintiff, it is considered and adjudged by the court that said plaintiff do recover of the said defendant the sum of $10,000, together with the sum of forty-three & $\frac{95}{100}$ dollars for his costs and disbursements, amounting in the whole to the sum of 10,043.95 dollars.

Done in open court, this seventeenth day of September, A. D. 1881.

S. A. HUDSON, *Judge.*

Attest: E. A. COREY, *Clerk.* [SEAL.]

164 TERRITORY OF DAKOTA,
Third Judicial District, County of Burleigh:

At a general term of the district court within and for the county of Burleigh, in the said district, held at the court-house in the city of Bismarck, in said county, on the 4th day of June, 1881.

Present: The Honorable Sanford A. Hudson, judge.

Judgment for Plaintiff on Trial by Jury.

CLAYTON D. HERBERT, Pl'ff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Def't.

This action having been tried by a jury at a general term of the district court for Burleigh county, held at the court-house in Bismarck on the 4th day of June, A. D. 1881, before the Hon. Sanford A. Hudson, judge, and the jury, after hearing the evidence, the argument of counsel, and instructions of the court, retired, and thereafter returned into court a verdict in said cause for said plaintiff and against said defendant therein for the sum of twenty-five thousand dollars, and said verdict having been entered on the minutes of the court;

And whereas, upon a motion by defendant for a new trial in said cause, argued and heard at Fargo the 14th day of September,
165 1881, before the Hon. Sanford A. Hudson, it was ordered by the court that a new trial be granted & allowed defendant, unless the plaintiff would at once remit fifteen thousand dollars of the said verdict;

And whereas the plaintiff has offered to and has remitted fifteen thousand dollars of the said verdict, and filed his permission thereof, in writing, with the clerk of this court this day:

Now, on motion of Wilson and Ball, of counsel for plaintiff, it is considered and adjudged by the court that said plaintiff do recover of the said defendant the sum of ten thousand dollars, together with the sum of forty-three and $\frac{95}{100}$ dollars for his costs

and disbursements, amounting in the whole to the sum of ten thousand forty-three and $\frac{95}{100}$ dollars.

Done in open court, this 17th day of September, A. D. 1881.

S. A. HUDSON, *Judge.*

[SEAL.] Attest: E. N. COREY, *Clerk.*

165½ [Endorsed:] District court, Burleigh county. Clayton D. Herbert *vs.* The Northern Pacific Railroad Company. Order for judgment. Filed this 20th day of September, 1881. E. N. Corry, clerk. Wilson, Wilson & Ball, att'ys for pl'ff.

166 *Undertaking on Appeal.*

TERRITORY OF DAKOTA, *County of Burleigh:*

District Court.

CLAYTON D. HERBERT, Pl'ff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, D'f's.

Whereas the defendant in said action is about to appeal to the supreme court of said Territory from the judgment heretofore rendered in said action against it, the said defendant, for the recovery of the sum of ten thousand dollars and the costs and disbursements of said action:

Now therefore, we, Patrick H. Kelly and W. P. Clough, of the county of Ramsey and State of Minnesota, hereby undertake for and on behalf of the said defendant to and with the said plaintiff that the said appellant will pay all costs and damages which may be awarded against it on the appeal, or on the dismissal thereof, and that if the judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and

167 all damages and costs which shall be awarded against the appellant upon the appeal.

In testimony whereof, we have hereunto set our hands, on this 29th day of September, A. D. 1881.

P. H. KELLY.
W. P. CLOUGH.

STATE OF MINNESOTA, *Ramsey County:*

I, Otto Kneffner, a notary public in and for said county, hereby certify that Patrick H. Kelly and Wm. P. Clough, the persons who executed the foregoing undertaking, came before me this day, and, having each been duly sworn, did depose and say: That he is worth double the amount specified in said undertaking, above debts, liabilities, and property exempt from liability to levy and sale under execution.

P. H. KELLY.
W. P. CLOUGH.

Subscribed and sworn to before me on the 29th day of September, A. D. 1881.

[SEAL.] OTTO KNEFFNER,
Notary Public, Ramsey Co., Minn.

167½ [Endorsed:] Clayton D. Herbert *vs.* The Northern Pacific Railroad Company. Bond on appeal to the supreme court. Filed Oct. 1st, 1881. E. N. Corey, clerk.

168 TERRITORY OF DAKOTA, } *ss:*
County of Burleigh, }

District Court.

CLAYTON D. HERBERT, Pl'ff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Def't.

To Wilson and Ball, attorneys for the above-named plaintiff, and E. N. Corey, clerk of the said district court:

Please take notice that the above-named defendant appeals to the supreme court of the Territory of Dakota from the judgment of the said district court herein entered on the 20th day of September, 1881, against the defendant and in favor of the plaintiff, for the recovery of the sum of ten thousand dollars damages, besides costs and disbursements.

Dated this 29th day of September, 1881.

W. P. CLOUGH,
Attorney for Defendant.

168½ [Endorsed:] Clayton D. Herbert *vs.* The Northern Pacific Railroad Company. Notice of appeal. Filed October 1, 1881. E. N. Corey, clerk.

169 TERRITORY OF DAKOTA, } *ss:*
County of Burleigh, 3rd Judicial District, }

CLAYTON D. HERBERT, Pl'ff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

I, E. N. Corey, clerk of the district court within and for the third judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal, of the judgment roll, and of the order appealed from, and of all the papers and proceedings upon which such order was granted, and of the certificate of the judge in the above-entitled action, wherein Clayton D. Herbert *D. Herbert* is plaintiff and the Northern Pacific railroad is defendant, as the same now remains of record in the said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 1st day of October, A. D. 1881.

[SEAL.] E. N. COREY, *Clerk.*

170 *Amended Notice of Appeal.*

TERRITORY OF DAKOTA:

Burleigh County District Court.

CLAYTON D. HERBERT, Plaintiff & Respondent,
ag'st
NORTHERN PACIFIC RAILROAD COMPANY, Defendant & Appellant.

Please take notice that the defendant in the above-entitled action appeals from the judgment heretofore rendered in the above-entitled action in favor of the plaintiff and against the defendant for the recovery of the sum of ten thousand dollars ($10,000) damages, besides the costs and disbursements of said action, to the supreme court of said Territory, and also from the order of the said court denying the defendant's motion for a new trial, which order the defendant will, upon such appeal from said judgment, ask to have examined and reversed by the said supreme court.

W. P. CLOUGH,
Att'y for Def't.

To Messrs. WILSON & BALL,
Att'ys for Pl'ff.

171 It is hereby stipulated that the above-written amended notice of appeal shall be deemed to stand for and in the place of the original notice of appeal in said action heretofore served; that due service of such amended notice is hereby admitted to the return to the supreme court in said case, without any further or other authentication whatever.

Dated October 3, 1881.

W. P. CLOUGH,
Att'y for Def't.
WILSON & BALL,
Att'ys for Pl'ff.

171½ [Endorsed:] Territory of Dakota supreme court. Clayton D. Herbert *vs.* N. P. R. R. Co. Amended notice of appeal. Filed May 8th, 1882. B. S. Williams, clerk. W. P. Clough, att'y for app.

172 *Notice of Trial.*

TERRITORY OF DAKOTA:

In the Supreme Court.

CLAYTON D. HERBERT, Resp't,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, App't.

SIR: You will please to take notice that the issues of law in the above-entitled action will be brought on for argument at the next gen'l term of the supreme court aforesaid appointed to be held in and for said Territory, at Yankton, D. T., on the 9th day of May,

A. D. 1882, at the opening of said court on that day, or as soon thereafter as counsel can be heard.

Dated April 19, 1882.

Yours, respectfully,

WILSON & BALL & THO. WILSON,
Attorneys for Resp't.

To W. P. CLOUGH,
Attorney for Appellant.

172½ [Endorsed:] Territory of Dakota supreme court. Clayton D. Herbert, resp't, *vs.* N. P. R. R. Co., app't. Notice of argument. Due service of within notice is hereby admitted this 21st day of April, A. D. 1882. W. P. Clough, attorney for def't. Wilson & Ball & Wilson, attorneys for resp't. Filed April 27th, 1882. B. S. Williams, clerk.

173 U. S. Supreme Court. May Term, A. D. 1882, 2nd Day of Term.

WEDNESDAY, *May 10th*, 1882.

Court met pursuant to adjournment.

Present: Hon. A. J. Edgerton, chief justice; Hon. G. C. Moody, associate justice; Hon. J. P. Kidder, associate justice; Hon. S. A. Hudson, associate justice; Hugh J. Campbell, U. S. attorney; J. B. Raymond, U. S. marshal, by C. A. Gray, deputy; Warren Osborn, crier; C. Jensen and C. A. Spink, bailiff; B. S. Williams, clerk.

Court being duly opened the following proceedings were had:

CLAYTON D. HERBERT, Respondent,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Appellant. } N-. 118.

And now this 10th day of May, 1882, the above cause coming on for hearing, now comes W. P. Clough, Esq., appearing for said appellants, and Judge Wilson for Clayton D. Herbert, said respondent; and thereupon the cause submitted to the court.

174 Be it remembered that at a term of the supreme court of the Territory of Dakota, begun and held in the capitol, in Yankton, the seat of government of said Territory, on the second Tuesday of May, to wit, on the ninth day of May, A. D. 1882, on the ninth day of the term, to wit, on the eighteenth day of May, A. D. 1882—present, A. J. Edgerton, chief justice, and G. C. Moody, J. P. Kidder, and S. A. Hudson, associate justices of said court—the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In the Supreme Court. Appeal from the District Court of Burleigh County.

CLAYTON D. HERBERT, Plaintiff & Respondent,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant & Appellant.

This action coming on to be heard at the May, A. D. 1882, term of said supreme court, at the supreme court-room, in the city of Yankton, D. T.

Present: A. J. Edgerton, chief justice, and G. C. Moody, J. P. Kidder, and S. A. Hudson, associate justices.

And the appeal herein having been argued by W. P. Clough,
175 Esq., for the appellant, and by Thomas Wilson, Esq., for the respondent, and the court having — advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Burleigh county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceeding according to law and the judgment of this court.

And it is further considered and adjudged that the pl'ff & respondent have and reeover of the def't and appellant his costs and disbursements on this appeal expended, taxed and allowed at nine dollars and twenty-five cents ($9.25).

By the court:

A. J. EDGERTON,
Chief Justice Supreme Court D. T.

All the justices concurring.

176 In the Supreme Court of the Territory of Dakota.

CLAYTON D. HERBERT, Plaintiff,
ag'st
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Know all men by these presents that we, Patrick H. Kelly and W. P. Clough, sureties of the Northern Pacific Railroad Company, the defendant above named, are held and firmly bound unto Clayton D. Herbert, the plaintiff above named, in the full and just sum of fifteen thousand dollars, to be paid to the said Herbert, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this twenty-fifth day of May, A. D. one thousand eight hundred and eighty-two.

Whereas lately, in a suit depending in the said court between the parties above named, judgment was rendered against the said defendant, and the said defendant having obtained a writ of
177 error, and filed a copy thereof in the clerk's office of said court, to reverse the said judgment in the aforesaid suit, and a cita-

tion directed to the said Clayton D. Herbert, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October, A. D. one thousand eight hundred and eighty-two:

Now, therefore, the condition of the above obligation is such, that if the said Northern Pacific Railroad Company shall prosecute the said writ of error to effect, and shall answer all damages and costs if it shall fail to make its said plea good, then the above obligation to be void, else to remain in full force and virtue.

PATRICK H. KELLY. [SEAL.]
W. P. CLOUGH. [SEAL.]

STATE OF MINNESOTA, } ss:
Ramsey County, }

Personally came before the undersigned, a notary public in and for said county, Patrick H. Kelly and Wm. P. Clough, the sureties in the foregoing instrument, and each of them, having been first duly sworn, did depose and say that he is a resident freeholder
178 in the State of Minnesota, and worth the penalty named in the said bond, over and above all debts, liabilities, and property exempt from levy and sale under execution.

P. H. KELLY.
W. P. CLOUGH.

Subscribed and sworn to before me, this 3d day of June, A. D. 1882.

DANIEL B. NEUNDEGS,
Notary Public, Ramsey Co.

178½ [Endorsed:] Supreme court, Territory of Dakota. Clayton D. Herbert against Northern Pacific R. R. Co. Bond on appeal. This bond is fully approved. A. J. Edgerton, ch'f justice. Let writ of error issue upon filing within bond. A. J. Edgerton, chief justice. Filed in my office this 7th day of June, A. D. 1882. B. L. Williams, clerk.

179 *Syllabus.*

The ruling of the court sustaining a challenge to a juror for cause, although not justified by the facts disclosed in his examination, is not error for which a judgment will be reversed when he might have been challenged peremptorily by the same party, and it not appearing that the defendant was prejudiced by such ruling, the cause having *having* been tried by a competant jury.

An employer is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow servant engaged in the same general business and performing services for the same general purposes; but to this rule there are well defined exceptions. One, and perhaps the most important of these exceptions, arises from the obligation of the master whether a natural person or a corporate body not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

It is implied in the contract between the parties that the servant risks the danger which ordinarily attend or are incident to the business in which he voluntarily engages for compensation,
180 but it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business, and in selecting such means, machinery, and appliances, and in preserving and maintaining them in a suitable condition he shall not be wanting in proper care. His negligence in that regard renders him liable to an employee who sustains damage in consequence of such neglect. Sec-. 1130 and 1131 of the Civil Code is an enactment of the common law on that subject, and does not change this rule.

The master is liable as for his own neglect in failing to furnish proper and safe machinery or implements, and in failing to keep them in a safe and suitable condition for such use.

These duties belong to the master, and he cannot rid himself of responsibility for not performing them by showing that he delegated the performance to another servant, who neglected to follow his instructions.

The question of contributory negligence of the plaintiff, which would prevent a recovery in an action for damages against a railroad company, is generally a question of fact to be submitted
181 to a jury under proper instructions, and when it is so submitted the verdict of the jury is conclusive on that point; hence a refusal to charge the jury that certain acts of the plaintiff at the time the accident occurred constituted negligence and prevented a recovery was not error.

182 TERRITORY OF DAKOTA:

Supreme Court. October Term, 1882.

CLAYTON D. HERBERT, Plaintiff,
against
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Appeal from Burleigh County.

W. P. Clough, for appellant.
Thos. Wilson and Wilson & Ball, for respondent.

HUDSON, J.: This action was brought to recover damages of the defendant company for causing a fatal injury to the plaintiff's leg, necessarily requiring amputation.

It appears from the undisputed testimony in the case that on the 24th day of October, 1879, the plaintiff was in the employ of the defendant as brakeman in defendant's yard at Bismarck, and as such it was his duty, among other things, to attend, set, and loosen brakes when necessary upon freight trains that came into the yard, in separating and distributing cars, under the immediate direction of the yard-master, one Gilboy. That although the plaintiff had
183 had considerable experience as a brakeman at other places, he had worked in this yard but two days, when coming up with

some cars from the Missouri river landing to the yard at Bismarck a freight train which had come in from the East was standing upon the track, orders were given to separate and distribute the cars, and for this purpose the switch engine was coupled on and the work of switching commenced.

The plaintiff was ordered by the yard-master of defendant to go upon, brake, and stop two certain cars, numbered 1804 and 2280, which had theretofore been "kicked off" (as it is termed) and propelled by steam power upon a particular track, and were running towards some stationary cars standing on the same track. That the plaintiff, in obedience to said order, ascended the ladder on the rear end of car 1804, being the hind car, and ran to the forward end and attempted to set the brake attached to said car; that said brake was out of order and could not be made to work so as to stop the said cars, and was utterly useless for that purpose; that as soon as the plaintiff discovered that the brake on said car 1804 was in bad condition and useless he stepped on to car 2280, and took hold of the brake on said car for the purpose of braking and stopping
184 said cars. The brake on 2280 is what is termed a "step brake," having its upper bearing of the shaft and dog and ratchet upon a shelf or step about one foot below the top or roof of the car, and the plaintiff in attempting to set said brake stepped down with his left foot upon said shelf or step, it being designed for that purpose, and put his foot against the dog to hold it into the ratchet so as to make the brake effective in stopping the car, which brought his left limb between said cars. The brake on said car 2280 was also defective and out of order, it having been worn by use, and the ratchet would not hold. That while the plaintiff's foot was upon the step attempting to hold the dog to the ratchet the said cars being still in motion struck the stationary cars standing upon the said track.

At the time the train having said cars No-. 1804 and 2280 attached, came into the said yard at Bismarck the said car 1804 was broken and defective in other respects than in the brake mentioned; it had met with an accident on its way from Fargo to Bismarck, by which the "dead-wood" and "draw-bar," sometimes called "bumper," had been pulled out and was then out, and the two cars had been
185 chained together, and were so connected at the time the same were switched off as aforesaid. The two ends so chained together were the ends having the brakes, and the end of 1804 having the bumper out. That when car 2280, being forward, struck the stationary cars standing on the track as before described, by reason of car 1804 having no bumper, the two cars were forcibly driven together, and coming in close contact caught and crushed and injured the plaintiff's left leg, from which injury amputation became necessary.

There was some evidence tending to show that the plaintiff knew, or had reason and opportunity to know, of the defective condition of these cars, but the plaintiff testified on the trial that he had no such knowledge. The defendant also gave evidence upon the trial

to show that it had a car repairer at its yard in Bismarck, whose duty it was to repair its cars, and to keep them in repair.

Verdict for the plaintiff and judgment, from which the defendant appeals.

The defendant alleges several errors occurring at the trial in the court below, and to which exception was duly taken, but it is not deemed of importance that all of these should be noticed, but only such as were pressed upon the attention of the court by the
186 learned counsel in his argument of the case. And first appears, that when the cause was called for trial, and jury was being empannelled, one C. S. Weaver was called as a juror and sworn upon his *voire dire;* that after examination he was challenged for cause by plaintiff's counsel, and the court sustained the challenge. To which decision of the court the defendant excepted.

We need not enquire whether the examination of the juror showed a good cause of challenge as the question may be disposed of, as far as this appeal is concerned, on other grounds. It does not appear from the record that the defendant was prejudiced by not having this juror on the panel. The cause was tried by a competent jury; the defendant could not be restored to its rights by a new trial, as it could not have this juror empannelled again. The plaintiff, for aught that appears in this record, might have challenged this juror peremptorily. Nor does it appear that the counsel for the defendant had exhausted his peremptory challenges or that he did all that he could to free the panel from objectionable jurors. The panel may have been finally acceptable to him. It is for the defendant to show that it was prejudiced by the decision of the court. A judg-
187 ment will not be reversed unless it appears that a party's rights have been prejudiced; and as it does not appear that there was any legal objection to the jury which tried the case, the defendant has not in any legal sense suffered injury, and the court will presume nothing in favor of the party alleging error. Morrison *v.* Lovejoy, 6 Minn., 224; Atlas Mining Co. *vs.* Johnson, 23 Mich., 36.

Secondly. The defendant insists that the plaintiff cannot recover for an injury caused by the negligence of his co-employee engaged in the same general business, assuming that the evidence shown that the accident which caused the injury to plaintiff was solely from the negligence of his co-employee, viz., the car repairer or yard-master.

This is stating a fundamental principle of law, and cannot be disputed if the defendant's assumption is true. It may be granted that if the case presented in this contention is one falling within that rule of law, and not within any exception to the rule, the defendant ought to prevail. This doctrine of exemption of the common master from liability to his servent for injuries caused by the negligence of a fellow servant engaged in the same general employment
188 is stated by C. J. Shaw in Farwell *vs.* Boston & Worcester R. R. Co., 4 Met., 49, as follows:

"He who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the

performance of such services, and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know, and against which he can as effectually guard as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other." In Lawing *vs.* N. Y. C. R. R. Co., 49 N. Y., 521, Folger, C. J., states the law as follows:

"A master is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow servant engaged in the same general business; nor is the liability of the master enlarged when the servant who has sustained an injury is of a grade of the service inferior to that of the servant or
189 agent whose negligence, carelessness, or misconduct has caused the injury. * * * If they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose, the master is not liable."

But the same courts declare that while the general doctrine as thus stated is sustained by elementary writers of high authority and by numerous adjudications of the American and English courts, there are well defined exceptions, which, resting as they clearly do upon principles of justice, expediency, and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

One, and perhaps the most important of those exceptions, arises from the obligation of the master whether a natural person or a corporate body, not to expose the servant when conducting the master's business to perils or hazards against which he may guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with
190 machinery or other instrumentalities adequately safe for use by the latter.

It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligenee in that regard is not a hazard usually or necessarily attendant upon the business; nor is it one which the servant in legal contemplation is presumed to risk, for the obvious reason that the servant, who is to use the instrumentalities provided by the master, has ordinarily no connection with their purchase in the first instance, or with their preservation or maintainance in suitable condition after they have been supplied by the master. Hough *vs.* Railway Co., 110 U. S., 213. Flike *vs.* Boston & Albany R. R. Co., 53 N. Y., 549.

191 This is a comprehensive statement of the common law applicable to the case at law, but the learned counsel for the defendant cites sect. 1130, Civil Code of Dakota, and insists that this sect. places the master and employee under a different rule than the one above stated, and throws upon the latter all the hazards growing out of the negligence of his co-employee. Said section is as follows:

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

But we cannot see that the section of the statute above quoted has changed in any respect the rule of law relating to this subject. It has enacted simply the common law into the statute which cannot give it any more force than it had before such enactment. If the position of the counsel is maintainable, then the company could not be held liable for an injury to an employee of the negligence
192 of another employee was at all involved, even though the company had been mainly in fault, unless the fault was by not using ordinary care in selecting the culpable employee.

If the position of the appellant is upheld in its full extent, it will in most cases relieve a corporate body and any employer who acts through general superintendents from liability to servants for injuries occasioned by imperfect and defective machinery, by unsafe mechanical means or appliances of any kind, as well as by incompetent and unskillful sub-agents furnished without due care. The next section of the civil code clearly shows by the terms employed that an employer is not to enjoy such an immunity from liability as contended for by the appellant. It is as follows: "Sect. 1131. An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care." We are then brought to the question: What is want of ordinary care? in the employer, and when and under what circumstances is he guilty of neglect within the meaning of the law and for which he must be held liable?

This section of the statute is in perfect accord with the de-
193 cisions which hold that the master is liable to a servant for his —the master's—own negligence or want of care and prudence, or for his own personal act or misconduct, occasioning injury and damage to the servant. And such negligence, want of care, and prudence, or misconduct may be shown in the mismanagement of the master's affairs in the selection or furnishing of improper or unsafe machinery, implements, or materials for the use of the servant and his neglect in maintaining and keeping them in a safe and suitable condition for such use. It is claimed by the counsel for the appellant that having provided a car-repairer at this yard whose duty it was to keep the cars and machinery in repair, it was his neglect and not the company's that these cars were in a dangerous and unsafe condition.

We understand the principle maintained in the cases cited to

be, that there are certain duties which concern the safety of the servant that belong to the master to perform, and he cannot rid himself of responsibility to his servant for not performing them by showing that he delegated the performance to another servant who neglected to follow his instructions or omitted to do the duty entrusted to him.

That the acts which the master as such is bound to per-
194 form for the safety and protection of his employees cannot be entrusted to another so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, and in respect to such duty the servant who undertakes to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury. It is sometimes a little difficult to determine how far the master's duty within the rule extends. But in the case at bar there cannot be much uncertainty in that regard. The courts all agree that it is a part of the contract of hire on the part of the master that he will furnish for the use of his servants proper, suitable, safe, and sufficient machinery and appliances and keep them *in* a safe and suitable condition for such use. This is an imperative duty, a failure to perform which renders him liable as for his own neglect. Cone *vs.* Delaware, L. & W. R. R., 81 N. Y., 206; Bessex *vs.* C. & N W. R'way Co., 45 Wis., 481; 110 Mass., 281; Fuller *vs.* Jewett, 80 N. Y., 46; Drymala *vs.* Thompson, 26 Minn., 40; Snow *vs.* Hoosetonic R'way Co., 8 Allen, 441; Flike *vs.* Boston & Albany R. R. Co., 53 N. Y., 549.

It is clearly made to appear in this case that the injury to the plaintiff was the result of the broken car 1804, and the defective and useless condition of the brakes upon both cars. The draw-
195 bar and dead-wood being out of car 1804 there was nothing to prevent the cars running together upon meeting with resistance. This of itself might not have caused harm to the plaintiff, but the brake on this car 1804 was out of order, defective, and could not be made to work; had this brake been in proper condition, the cars might have been stopped before reaching the stationary cars on the track, and plaintiff would probably have remained on that car until they were stopped; but this brake upon 1804 failing to work; as it did, the next thing for the plaintiff to do was to step onto car 2280 and attempt to set the brake on that car. That brake was also out of order, and while his foot was upon the dog for the purpose of holding it to the ra-chet the cars striking the stationary cars were forced together and his leg was caught. Had this brake been in good condition he might still have escaped injury, as his foot would probably have been removed before the concussion. Can we say, then, that the failure of the defendant to keep these cars, the brakes, and machinery upon them, in a proper and safe condition for the use of its employees was not negligence for which it was liable? We cannot upon the law and facts presented in this record so decide.

The defendant alleges as error the refusal of the court be-
196 low to charge the jury, as requested by defendant's counsel, "that if the plaintiff knew, or had reason to know, of the

broken or defective condition of the car before the accident to him, he cannot recover."

This instruction as a whole could not be given. It assumed that if the plaintiff had such knowledge he could not recover under any circumstances, whereas it is a proper question to go to the jury whether the circumstances were such, even having such knowledge, he was himself in fault, and for that reason not entitled to recover. But the instruction is not warranted by the evidence, as it is confined to the broken car simply; whereas there were defects in the brakes independent of the injury to the car. Nor could it be given for the reason that having reason to know, or having means of knowledge, is not sufficiente to prevent a recovery in any case. It must be actual knowledge to have that effect.

Error is also alleged in the refusal of the court to charge the jury that certain acts and omissions of the plaintiff was negligence and prevented a recovery, as follows:

That the placing of plaintiff's limb between the cars in question was not a necessary act, but was voluntary on his part, and that his exposure of his limb to this peril was negligence on his part,
197 and prevents a recovery of damages for the injury which he received. That the plaintiff having from experience the knowledge of the liability of cars thus employed to become broken and disabled, it does not appear that he took any particular care to avoid injury from such peril, and therefore cannot recover.

The question of contributory negligence on the part of the plaintiff in actions of this kind has been held by a long line of authorities to be a question of fact for the jury. Negligence is to be determined from all the facts and circumstances attending the case. Certain acts may be negligence under some circumstances and not so under other or different circumstances. Ford *vs.* Fitchburg R. R. Co., 110 Mass., 261; 100 W. S., 225; 49 N. Y., 521; 15 Wall., 401.

It appears from the evidence in this case that the plaintiff, immediately previous to the accident, came into the defendant's yard and found the freight train in which were the two cars in question standing on the track. The switching and distributing of these cars commenced at once; the plaintiff had worked in this yard but two days. He could not therefore have been very familiar with the other employees, the cars, or the work of the yard. He was ordered by the yard-master to brake and stop these two cars at a certain point, which evidently required hasty and immediate action;
198 hence the question whether he did know, or had reason to know, of the broken and defective condition of the cars, and whether he was guilty of negligence or was reckless in acting as he did under these circumstances, were proper questions to be submitted to a jury. Mehan, Administratrix, etc., *vs.* The Syracuse, Binghampton & New York R. R., 73 N. Y., 586; Hough *vs.* Railway Co., 100 W. S., 225.

We find by looking into the record that the court did charge on these points as follows:

"If the plaintiff, either from the unusual appearance of the car, as, for instance, its being attached to the next car by chains, or from

any statement of the yard-master or car repairer, had reason to suppose the car in question was defective or had been broken, it was his duty to take care not to expose his person to injuries which a broken or defective car might cause."

"If the jury believe the evidence of Gilboy, that statements were made by him in the presence and hearing of plaintiff that the car was broken, and that it should be taken out and repaired, that was sufficient notice to the plaintiff that the car was defective, and he was bound to take care not to expose his person to injury on account of such defect."

"If the plaintiff was careless, heedless, or negligent at the time the injury occurred, and such carelessness, heedlessness, or negligence materially contributed to the injury, he cannot recover."

199 "If you find from the evidence that the defendant was guilty of negligence in not providing proper and safe machinery and appliances, in consequence of which neglect the injury was received; still if the plaintiff failed to exercise that prudence, care, and caution which a prudent man under similar circumstances ordinarily would exercise, which contributed approximately to the injury, he is not entitled to recover."

The defendant cannot be heard to say, in view of these instructions and the finding of the jury upon them, that there is any question of contributory negligence for this court to consider. It was an issue raised by the pleadings, and evidence was given to that point by both parties which was somewhat conflicting. Under the decisions of this court the verdict is conclusive upon that issue. Canfield *et al. vs.* Bogle, 11 N. W. Rep., 511, and cases cited.

In such a case as the one presented in this record the burden of proof to show contributory negligence was upon the defendant. Indianapolis & St. Louis R. R. Co. *vs.* Hurst, 93 U. S. 291; Wharton on Negligence, sec. 423, and authorities cited; Railroad Company *vs.* Gladmon, 15 Wall., 401.

All the questions worthy of notice have now been considered. There being nothing in the case to call for any interference with the result, the judgment of the district court is affirmed.

All the judges concurring.

200 In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,

ag'st

CLAYTON D. HERBERT, Defendant in Error.

To Clayton D. Herbert, defendant in error above named:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Dakota, wherein the Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff

in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

201 Witness the honorable chief justice of the supreme court of the Territory of Dakota, this seventh day of June, in the year of our Lord one thousand eight hundred and eighty-two.

A. J. EDGERTON,
Chief Justice of Supreme Court of Territory of Dakota.

202 [Endorsed:] United States Supreme Court. Northern Pacific R R. Co., pl'ff in error, ag'st Clayton D. Herbert, def't in error. Citation. Service of a copy of the within citation is hereby admitted, this 23d day of June, A. D. 1882. Wilson & Ball & Thomas Wilson, pl'ff's att'ys.

203 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Dakota, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment of a plea which is in the said supreme court before you, the said judges, between the Northern Pacific Railroad Company, plaintiff in error, and Clayton D. Herbert, defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to cor-

204 rect that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, the fourteenth day of June, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] B. S. WILLIAMS,
Clerk of the Supreme Court of the Territory of Dakota.

205 [Endorsed:] United States Supreme Court. Northern Pacific Railroad Company, plaintiff in error, against Clayton D. Herbert, defendant in error. Writ of error. Service of a copy of the within writ of error is this 23d day of June, 1882, admitted. Wilson & Ball & Thomas Wilson, pl'ff's att'ys.

206 TERRITORY OF DAKOTA, *ss:*

In Supreme Court.

I, B. S. Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify and return, in obedience to the annexed writ of error, that the above and foregoing is a full, true, and complete copy of the transcript of the record in this action, to wit, of the record and final judgment of the district court of Burleigh county, Dakota, transmitted to this court, together with the notice of appeal therefrom to this court, of the minutes and final judgments of this supreme court filed herein, and also of the opinion of said supreme court filed in said action, together with the original citation filed and served, and of the bond on writ in this action.

In testimony whereof I have hereunto set my hand and fixed the seal of said court, this 8th day of September, A. D. 1882.

[SEAL.] B. S. WILLIAMS, *Clerk.*

Endorsed on cover: Dakota Territory supreme court. No. 356. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Clayton D. Herbert. Filed 10th October, 1882.

116-647

FILED.
NOV 13 1885
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States,

OCTOBER TERM, 1885.

No. 87.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

CLAYTON D. HERBERT,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GEO. GRAY,
W. P. CLOUGH,
For Plaintiff in Error.

THE EVENING POST JOB PRINTING OFFICE, 206 & 208 Broadway, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1885.

NO 87.

NORTHERN PACIFIC R. R. COMPANY,
Plaintiff in Error,

AGST.

CLAYTON D. HERBERT,
Defendant in Error.

Statement of the Case.

This is a writ of error to the Supreme Court of Dakota Territory.

The plaintiff in error, in the year 1879, was operating its railroad from its eastern *termini* as far westward as the Missouri river, in Dakota Territory.

The western terminal station of that period was Bismarck, a town situated on or near the easterly bank of that stream.

The yard and station buildings, at that point, were located on a plateau, about one mile eastwardly from the stream, and tracks extended from the yard to the river bank,

where connections were made with boats plying on the river.

In the month of October, 1879, the defendant in error, Herbert, was engaged in the service of the railroad company, in and about the station and yard mentioned, in the capacity of yard-brakeman.

His duties as such employee were confined to the yard and immediate vicinity, and were concerned with the making up of trains to depart eastward, and the distribution of the cars in trains which had arrived from the east.

Prior to this time Herbert had been railroading for a number of years. He had worked about nine months on the U. P. R. R., as train brakeman, and about two years on the N. P. R. R., part of the time as fireman and the remainder of the time as train brakeman. On the second day of his service in the Bismarck yard, while Herbert was engaged in distributing the cars composing a freight train that had arrived from the east on the same day, his leg was caught between the tops of two cars, which the absence of "bumpers" and a "draw-head," so called, from one of them, permitted to come in contact, endwise, and was crushed so badly as to necessitate amputation.

In January, 1881, Herbert began this suit against the railroad company, alleging that his injuries had resulted from the neglect of the latter, in suffering its said cars to be and remain out of repair, laying his damages at $25,000.

Printed Record, pp. 1–4.

The defendant interposed an answer to Herbert's complaint, putting all its allegations in issue, and asserting that Herbert was hurt through his own carelessness.

Printed Record, pp. 5–6.

The case was tried before the District Court and a jury, in May, 1881, and resulted in a verdict in Herbert's favor for the sum of $25,000.

Sundry exceptions were taken by the company upon the trial, and, shortly after its conclusion, the company, in accordance with the practice the Dakota Territorial

Courts, prepared and had settled and authenticated by the trial Judge, a statement of the case, containing the evidence adduced and rulings made upon the trial.

Upon this case the company moved the trial Judge for a new trial, on the grounds:

FIRST.—That the damages awarded by the jury were greatly excessive, appearing to have been given under the influence of passion or prejudice.

SECOND.—That the evidence adduced upon the trial was insufficient to justify the verdict.

THIRD.—That the Court committed sundry errors of law to the detriment of the defendant, all of which had been duly excepted to by the defendant upon the trial.

Printed Record, p. 104.

The motion having been duly argued by counsel, and considered by the Court, the latter made its interlocutory order thereon, ruling that, unless Herbert should remit $15,000 of the verdict, the same should be set aside, and a new trial be granted.

Printed Record, pp. 104–105.

Herbert submitted to this order, and filed his remittal of the sum required; whereupon judgment for the sum of $10,000 and costs was entered against the company.

Printed Record, pp. 105–106.

From this judgment the company, under the territorial procedure, appealed to the territorial Supreme Court, and the judgment of the trial Court having been there affirmed, it sued out this writ of error.

Assignment of Errors.

The following errors appear upon the record, each of which is assiged as cause for reversal here:

The trial Court erred:

1. In sustaining a challenge for cause, interposed by

Herbert's counsel to C. S. Weaver, summoned as a juror for the trial of the cause.

Printed Record, pp. 21–24.

2. In refusing to grant a motion made by the company, at the close of Herbert's case, that the suit be dismissed because Herbert had failed to establish a cause of action.

Printed Record, p. 66.

3. In refusing, after the close of the evidence, to instruct the jury, upon the company's request, as follows:

"That the evidence is not sufficient to warrant a verdict "for the plaintiff; and the verdict must, therefore, be for "the defendant."

Printed Record, p. 96.

4. In refusing, after the close of the evidence, to instruct the jury, upon the company's request, as follows:

"If the accident to Herbert resulted from the yard-mas- "ter or car-repairer negligently omitting to notify Herbert "of the broken condition of the car, in that case the de- "fendant was not responsible for the injury which Her- "bert received."

Printed Record, p. 96.

5. In refusing, after the close of the evidence, to instruct the jury, upon the company's request, as follows:

"From the evidence in this case it appears that the "broken car, No. 1,804, shortly before the accident, had "arrived in the company's yard at Bismarck from a jour- "ney over the railroad; that such cars are liable, from or- "dinary use and travel upon the railroad, to become "broken in the place and manner wherein this car had "been broken. It further appears that the plaintiff had, "prior to the accident, had some experience in and knowl- "edge of the management of trains and cars, and must "be presumed to have known that such cars were liable "to such accidents. Hence it was the duty of the plain- "tiff to take care not to expose himself to the perils of "being hurt by cars so broken. His exposure of his "limbs to be hurt in such a way was negligence on his "part, and prevents his recovery of damages for the in- "juries which he received."

6. In refusing, after the close of the evidence, to instruct the jury upon the company's request as follows:

"It appears from the evidence in the case that cars, "reaching the terminus of the railroad at Bismarck in a "broken and disabled condition, have always been one of "the ordinary incidents of operating defendant's road; "that cars should reach the company's yard at Bismarck "in a broken and disabled condition, and that such cars "might do injury to the company's employees at that "yard, unless such employees should take special care to "prevent such injuries, have, therefore, always been or- "dinary perils of the business in which the plaintiff was "engaged at the time of the hurt. Hence, as it does not "appear that the plaintiff took any or particular care to "avoid injury from such a peril, he cannot recover in this "action."

Printed Record, p. 97.

7. In refusing, after the close of the evidence, to instruct the jury, upon the company's request, as follows:

"The plaintiff cannot recover from the defendant, by "reason of any acts of negligence on the part of any "other persons employed by the defendant in the same "general business with the plaintiff. This would include "the yard master and car repairer."

Printed Record, p. 97.

8. In giving to the jury, after the close of the evidence, under objection of the company, the following instructions:

"He who engages in the employment of another, for "the performance of specific duties and services for "compensation, takes upon himself the natural and "ordinary risks and perils incident to the performance "of such services, including perils arising from the care- "lessness and negligence of those who are in the same "employment. But there are exceptions to the rule, one "of which is, that the master, whether a natural person "or a corporate body, should use due care not to expose "the servant, when conducting the master's business, to "perils or hazards, against which he may be guarded by "proper diligence upon the part of the master."

"To that end, the master is bound to observe all the "care which prudence and the exigencies of the situation "require, in providing the servant with machinery and

" other instrumentalities adequately safe for use by the " latter. It is implied in the contract between the master " and servant, and public policy requires that, in selecting " the means and machinery in conducting his business, " the master shall not be wanting in proper care. His " negligence in providing, or in failing to keep in suitable " condition such machinery, is not a hazard usually or " necessarily attendant upon the business, nor is it one " which the servant, in legal contemplation, is presumed " to risk."

Printed Record, pp. 99–100.

9. In giving to the jury, after the close of the evidence, under objection of the company, the following instruction, that is to say:

" There is a legal obligation upon railroad companies to " exercise reasonable care, not only to provide but to main- " tain in suitable condition, the machinery and apparatus " to be used by its employees; and this obligation is the " more important, and the degree of diligence in its per- " formance is the greater, in proportion to the damages " which may be encountered; and the negligence of those " entrusted by the corporation with the power and duty " of procuring or keeping in repair such machinery is, in " law, the negligence of the corporation."

Printed Record, pp. 99–100.

10. In giving to the jury, after the close of the evidence, under objection of the company, the following instruction:

" That it is for the jury to find, whether there were not " other acts of negligence on the part of the defendant, " contributing to plaintiff's injury, than the defect in car " No. 1804; and, in that event, the jury should find for " the plaintiff, if plaintiff was free from negligence."

Printed Record, pp. 99–100.

11. In not setting the verdict wholly aside and granting a new trial, upon the motion made for that relief, instead of making the order it did.

Printed Record, pp. 104–105.

POINTS AND AUTHORITIES.

I.

The Trial Court erred in sustaining the plaintiff's challenge to the juror Weaver.

The evidence of Weaver, upon his examination, was as follows:

"C. S. WEAVER, being called as a juror, and first duly "sworn to true answers make touching his competency "to sit as a juror in this case, is examined as follows by "plaintiff's counsel:

"Q. Mr. Weaver, where do you live?

"A. In Bismarck.

"Q. What is your business?

"A. I am a lumber dealer.

"Q. How long have you been a lumber dealer?

"A. Something over five years here.

"Q. You ship your lumber over the Northern Pacific "road?

"A. Yes, sir.

"Q. Where is your lumber yard?

"A. It's lying on the track—just west.

"Q. Your office on the track—on the right of way?

"A. Yes, sir.

"Q. From whom did you rent that right of way?

"A. We didn't rent it.

"Q. From whom did you get it?

"A. The railroad management allowed us to go in there "and hold it until needed for other purposes of more "value.

"Q. In other words, they gave you a place for your "office and for your lumber yard without any cost until "they see fit to quit it; you are there, then, a kind of "tenant at will without rent?

"A. Yes, sir.

"Q. Do you know anything of this case; did you hear "of the occurrence when it happened?

"A. Being more or less acquainted with all the yard "boys—have to call on them every day, sometimes several "times a day—of course we would hear of such an acci-"dent.

"Q. Did you talk to any of them about it?

"A. I asked in regard to the accident; was told or

" heard that one had taken place; I think I asked the " yard-master how it occurred.

" Q. He explained to you how it occurred?

" A. Yes, sir.

" Q. Explained to you the circumstances?

" A. Yes, sir; probably told me in two minutes all that " occurred in regard to it.

" Q. Told you the reason of the accident, how it oc- " curred, etc.?

" A. Yes, sir; simply said the bad condition of the cars; " that was all.

" Q. Did you have any more particular explanation of " that?

" A. No, sir; I think I saw the cars where they were " being repaired, right opposite my office.

" Q. Went and looked at them yourself?

" A. Not particularly, any more than I saw the cars " standing there.

" Q. From what you heard at that time did you form " or express an opinion as to whether the company was " guilty of negligence, or whether the negligence of the " company, or anything done or left undone by the com- " pany, had caused this injury to the plaintiff? I don't " ask you what the opinion was; did you form or express " an opinion on that matter?

" A. I never thought of the occurrence until this came " up to-day.

" Q. At the time this yard-master explained to you?

" A. I simply heard it, and it passed out of my mind.

" Q. When he told you how it occurred, didn't your " mind come to any conclusion as to whether there was " or was not blame?

" A. I didn't think of it; I felt simply sympathy for the " man as being hurt.

" Q. You didn't think about the company; you thought " of the man?

" A. I didn't think—I thought of the man; I don't " think there is any one here but what would feel sym- " pathy for a young man like him getting maimed for " life.

" Q. But you didn't think whether the company was to " blame or not?

" A. No, sir; I did not.

" CROSS-EXAMINATION by defendant's attorney:

" Q. Mr. Weaver, don't you rent your office—isn't your " office in a building owned by somebody else—isn't it in " a building owned by Mr. Raymond?

"A. The part of the building in which my office is is "owned by C. S. Weaver & Co.

"Q. You have no arrangement with the railroad com- "pany in regard to that building, have you?

"A. No, sir; none whatever with the railroad company; "Mr. Raymond and C. S. Weaver & Co. built the build- "ing the office is in, in partnership, when it was built.

"Q. You simply dump your lumber off on the right of "way, the same as any other dealer does?

"A. Yes, sir.

"Q. Your office arrangement is with Mr. Raymond, and "not with the company?

"A. Yes, sir; Mr. Raymond obtained permission to put "that building at that point; at the time the building "was put there, there was quite a discussion as to where "we should put our yard; we were offered a position "across the track, where the railroad car shop now is; "we chose to go in with Mr. Raymond, on this side, as "long as the railroad would allow us to retain it.

"Q. Never made any lease or paid the railroad anything "for the use of the ground?

"A. No, sir.

"REDIRECT-EXAMINATION:

"Q. Your company and Mr. Raymond put up this "building together?

"A. No, sir; they permitted Mr. Raymond to put up "the building.

"Q. Didn't you put up part of that building under Mr. "Raymond's arrangement—didn't you put up part of that "building?

"A. Yes, sir.

"Q. Didn't you put it up with the understanding that "you could keep it there just as long as the company "pleased, and when they didn't please you would have to "get it off?

"A. Yes, sir.

"RECROSS-EXAMINATION by Defendant:

"Q. Who was that understanding had with, the rail- "road company or Mr. Raymond?

"A. It was through Mr. Raymond.

"Q. You and Mr. Raymond?

"A. Yes, sir.

"Q. You and the railroad company had no arrange- "ment?

"A. No, sir.

"REDIRECT-EXAMINATION by Plaintiff:

"Q. As to your lumber yard; that is on the railroad "ground?

"A. Yes, sir.
"Q. And subject to this understanding, that you can "keep it there so long as the railroad company wishes, "and no longer?
"A. Yes, sir.

"By the Court:
"Q. Who made the arangement with the railroad com- "pany, as regards the lumber yard?
"A. I made the agreement with the station agent here.
"Q. With railroad company?
"A. Yes, sir.

"RECROSS-EXAMINATION by Defendant:
"Q. In using this ground for a lumber yard, is it a "place where it is the usual custom, all along the line of the road, to unload lumber—handle it there?
"A. It is, so far as I know.
"Q. Have you made any lease, or agreed to pay any "rent or any compensation whatever?
"A. I never had.
"Juror challenged by the plaintiff, and allowed by the "Court; to which ruling the defendant excepts."

The laws of Dakota prescribing the mode of, and causes for, the challenging of trial jurors in civil causes, are as follows:

SEC. 243. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to three peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with plaintiff.

SEC. 244. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by the Political Code to render a person competent as a juror.
2. Consanguinity or affinity within the fourth degree to either party.
3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or surety on any bond or obligation of either party.
4. Having served as a juror, or been a witness on a pre-

vious trial between the same parties for the same cause of action.

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

6. Having an unqualified opinion or belief as to the merits of the action, founded upon the knowledge of its material facts, or some of them.

7. The existence of a state of mind in the juror evincing enmity against, or bias to or against either party.

8. That he does not understand the English language as used in the courts.

SEC. 245. A challenge for cause must be tried by the Court. The juror challenged, and any other person, may be examined as a witness, on trial of the challenge.

Dakota Code of Civil Procedure, sections 242–245.

The examination of the juror failed to reveal any actual bias in his mind for or against either party, or the existence of any belief or opinion on his part touching the merits of the case.

On the contrary, the questions put and answers given demonstrated affirmatively that he stood between the parties perfectly impartial. The examination did disclose the fact that he had heard of the accident about the time of its occurrence, and had received from some of the railroad hands a narration of how it happened. These things, however, only resulted in exciting sympathy for the misfortunes of Herbert, without creating any opinion as to where the blame should lie. The examination further disclosed the facts that the juror had certain business relations with the company. He was a lumber dealer, and employed the company as a carrier. His lumber yard was located upon the right of way for the railroad, where he was permitted to pile and store his lumber without charge, so long as the company should not desire the space for its own uses. These facilities, however, were merely such as the company was then in the habit of extending to all its patrons engaged in similar business all along its line. The firm of which the juror was a member was also occupying an office for carrying on its business, situated upon land belonging to the company, under terms

similar to those respecting the lumber yard. The permit for the office building, however, was not immediately from the company. The latter had granted the permit to one Raymond, and Weaver and his associates were by him allowed to join in erecting a building upon the premises, to be used in part by each. The most the facts are capable of showing is, that while Weaver was a perfectly unbiassed and disinterested juror, in consideration of his patronage, the company was permitting him to occupy space upon its property, in a usual manner, without rent, and at its pleasure. This probably made Weaver a sort of tenant at will of the company.

But, in Dakota Territory, *in civil cases*, the *complete* relation of landlord and tenant does not disqualify one from sitting as a trial juror. In enumerating, with great care and particularity, the relations between party and juror, from which, in civil trials, bias on the part of the juror is to be *inferred*, that of landlord and tenant has been *purposely omitted*.

No doubt the omission resulted from legislative design; because in *criminal trials*, the fact that the juror is a landlord or tenant of the complainant or defendant or injured party, excludes him from the panel.

The provisions of the *Criminal Code* of the Territory, upon the subject of challenges of jurors, is as follows:

SEC. 331. Particular causes of challenges are of two kinds.

1. For such bias, as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this Code as implied bias.

* * * * * * *

SEC. 332. A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the sixth degree, inclusive, to the person alleged to be injured, by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

2. Standing in the relation of guardian and ward, attorney and client, master and servant, *or landlord and tenant*, or being a member of the family of the defendant, or of the person alleged to be injured by the offense

charged, or on whose complaint the prosecution was instituted, or in his employment on wages.

3. Being a party adverse to the defendant, in a civil action, or having complained against, or been accused by, him, in a criminal prosecution.

4. Having served on the grand jury which found the indictment, or on a coronor's jury which inquired into the death of a person, whose death is the subject of the indictment.

5. Having served on a trial jury which had tried another person for the offense charged in the indictment.

6. Having been one of a jury formerly sworn to try the indictment, and whose verdict was set aside, or which was discharged without a verdict after the cause was submitted to it.

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions, as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a jury.

Criminal Code of Dakota Territory, Secs. 331, 332.

It will be observed from the above quotations that the Territorial Legislature has made several matters grounds for implying bias in *criminal* cases, which it has not for implying it in *civil* cases; and, further, that the ground of *relationship*, which in *civil* cases is limited at the *fourth* degree, in *criminal* cases was raised in the *sixth* degree. These differences undoubtedly resulted from the greater care supposed to be necessary in selecting jurors, when life or liberty are at stake, than where mere property interests are the subject of inquiry.

These civil and criminal statutes—both forming mere subdivisions of one contemporaneous statutory Code—when compared, show conclusively that the Legislature specifically considered the propriety of making the relation of landlord and tenant a ground for excluding jurors from the panel, and that, in *civil* cases, it expressly decided that such relationship *should not* form a ground for exclusion.

These statutes quoted form the *entire* body of law of the territory upon the subject. No other grounds of challenge

exist within that jurisdiction. The Legislature of Dakota, assuming an advanced position with regard to codification, has undertaken to construct a body of statutory law which shall be complete in itself, and displace all other rules upon the subjects therein treated.

That there might be no mistake upon this point, the following provisions were adopted :

SEC. 6. In this territory there is no common law, in any case where the law is declared by the Codes.

SEC. 2,124. The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this code. This Code establishes the law of this territory, respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects, and to promote justice.

Civil Code of Dakota Territory, Sections 6, 2,124.

The effort and purpose to embody the *whole law* upon any subject at all treated of in the codes, explains the unusual fullness and minuteness used in legislating upon that of challenges to jurors. What cannot be found in the provisions quoted, or in the context, does not form any ground of challenge; so that it cannot be claimed, in support of the exclusion of Weaver by the trial Court, that the statute contains a *part only* of the grounds of challenge, and that *other* grounds exist as part of the *common law* of the territory to which the Court might resort.

The subject of grounds of challenge of trial jurors in civil and criminal cases, having been one of those on which the Legislature has declared the law in the codes, by direct force of SEC. 6 of the Civil Code, there remains no common law, upon that suject, within the territory.

The examination of Weaver having conclusively proven the absence from his mind of any *actual* bias, and his business relations with the company not furnishing any ground upon which bias could be *implied*, it follows that he stood proven to be a competent and lawful juror, summoned upon the *venire* and drawn upon the panel, in strict accordance with territorial laws; and hence, that the Court, in excluding him from the panel, against the ob-

jection of the defendant, and merely because asked to do so by the plaintiff, erred.

But it is said that such errors do not form grounds for reversal; because, firstly, a party is only entitled to an unbiased and a disinterested jury, in any case; and, secondly, if a reversal were to follow the erroneously excluded juror would not be drawn upon the second jury. Applying these arguments to the case in hand, it is said that, notwithstanding Weaver's exclusion a fair jury was actually impanneled; and that, even if a new trial should be granted, Weaver could not be made one of the jurors to sit in it.

These suggestions sound well the first time heard; but cannot endure analysis. They are founded upon this fallacy, that, in the eye of the law one juror is the peer of any other in judgment, acumen, patience in investigation and mental self control; and that, as a consequence, a suitor's rights are limited to the *exclusion* from the jury box of those against whom legal objection exists. According to this theory, jurors are to be counted out to suitors, like a dozen eggs from a grocer's basket; if the count be right, and the commodity not too stale, the customer must be content; the main thing being to get precisely a dozen, and to throw out such as have been too much addled. With respect to jurors, the trial judge is to do the counting out; and if he tenders to a party the right number of men who will not confess themselves, under oath, to be prejudiced, the party must submit.

From the standpoint of those who assert the power of the trial judge to reject a juror without legal reason for so doing, the matter is incapable of different statement; for if one can be rejected in that way more can be; and the jury can be made up by the judge himself, selecting from the *venire* twelve men who are willing to swear themselves capable of deciding according to law and evidence; as what average men will not?

It would be sufficient for refuting the arguments of our opponents under this head, to show that, as a matter of

fact a fair and unbiased jury was not impannelled to try the cause.

The record shows that at least three jurors were put upon the panel, over the company's challenge for bias, whose examination showed very clearly to have previously formed, and at the time of the trial to have retained, positive opinions upon one or more questions necessarily involved in the controversy.

See examination of P. R. Smith, Printed Record, pp. 8–13*;* of *Conn. Maloy,* do *pp.* 13–19*;* of *William Franklin ; do pp.* 24–29.

But, what is perfectly conclusive as to the prejudiced character of this jury as a body is, that the trial court itself so distinctly decided, when the issue was specifically presented to it.

The verdict rendered against the company was $25,000.

The company moved to set it aside, upon the ground, among others, that the damages were excessive, resulting from passion or prejudice, on the part of the jury.

In such a case, where the damages were entirely unliquidated, and not capable of ascertainment by computation, an attack upon the *amount* of the verdict could not be put upon any other ground than the passion or prejudice of the jury. The laws of the territory relating to new trials did not permit anything else.

The trial judge, the same judge who delivered the opinion of the Supreme Court of the territory, wherein it is said that the jury was a competent one, and hence the company has no ground of complaint by reason of Weaver's rejection, decided with the company upon this issue, and directed a new trial, unless the plaintiff should remit 60 *per centum* of the verdict with which this alleged "competent" jury had presented him.

This seemed, and yet seems, to the company, a highly illogical proceeding.

The Court *necessarily* found the jury which sat in the case to have been *passionate* or *prejudiced*—and both mean one thing practically—and yet permitted the verdict to stand, in part. By so finding, the Court, also, by nec-

essary implication, found that the issues in the case had not been tried by such a jury as the law contemplates; and yet denied the company the right to have those issues passed upon by a fair and lawful jury. Upon the trial, there was a direct conflict of evidence upon one point, which, if found in the company's favor, must have given it the verdict. The evidence showed that the company kept employed in this yard a car repairer named Quinlan, whose duty it was to repair these very cars by which the injuries to Herbert was inflicted. He is admitted to have been about and at these cars after their arrival in the yard, and before distribution of them began, looking them over with the view of making the necessary repairs, and to have had a conversation with the yard-master concerning their broken condition. It was testified by the yard-master, that, when this conversation occurred, Herbert stood so near him as necessarily to have heard it.

Printed Record, pp. 75–76.

Herbert denied this statement.

Printed Record, p. 94.

It is manifest that, if the yard-master's statement about this matter was correct, Herbert must have certainly known the condition of the cars before exposing his limb to destruction by putting it between them, and that, if he exposed his limb to the hazard, knowingly, he took upon himself the risk of so doing.

Here, then, was a direct issue of fact, upon a vital point, which the company had the right to have tried by an unprejudiced and a dispassionate jury; and yet the Court, while expressly finding that the company had not yet had such a trial, denied it all chance of having one!

Furthermore, the wholly uncontradicted evidence adduced at the trial, showed facts from which the company contended that both Court and jury were compelled to infer contributory negligence upon Herbert's part.

Herbert, on the other hand, contended that the inferences of care or negligence, on his part, were matters for the jury, exclusively; and that the Court had no right to concern itself with them.

Conceding the latter theory to have been correct for the purpose of discussing the point now under view, here were other vital issues which the company was entitled to have tried by a dispassionate and an unprejudiced jury. The Court submitted those issues to the jury which sat; but that body was *not* dispassionate and unprejudiced, as the same Court, itself, expressly found. Hence, this is a case where the record shows a necessary finding by the trial Court that the issues have not been tried by such a jury, as every suitor is entitled to be tried by.

It cannot, then, be assigned for a reason why this company is not entitled to have the case tried by a lawful jury, that it has been tried by one such jury already.

But, the proposition that a suitor has not the right to insist upon having the benefit of the superior judgment and discernment of a juror who has been duly summoned and drawn upon the panel, must be false.

It is not true, as every one knows, that the *sole* essential quality in a juror is absence of passion and prejudice from his mind. It would be no exaggeration to say that some persons have fifty times the ability that others have, sitting in the same panel.

Why, then, insist upon assigning a false *equality* in that which nature has made so vastly *unequal*?

Why say, in this case, that Conn Maloy, who was accepted against the company's protest, was the equal of Weaver, the man of affairs, who was rejected under like protest?

Such an assertion would be an absurd fiction.

If, by any stroke of good fortune, a man of intelligence is drawn upon a jury, why should either party be cut off from the benefit of his services?

No good reason can be assigned for such a thing.

In the Territory of Dakota, the presumption that all jurors are men of equal intelligence and discernment would have no foundation in the facts.

The statutory mode of designating jurors in that Territory is such as necessarily to preclude such an inference.

Those portions of the statutes governing this subject are as follows:

SEC. 1. All male citizens residing in any of the counties of this Territory, having the qualifications of electors, and being over the age of twenty-one years, and of sound mind and discretion, and not judges of the Supreme Court, &c. * * * are and shall be competent persons to serve on all grand and petit juries within their counties, or subdivisions, respectively.

SEC. 2. In each of the counties wherein a district court is appointed to be holden, two hundred names shall be selected from the last annual tax list and furnished to the clerks of the district courts, by the County Commissioners, from which to draw the grand and petit jurors.

* * * * * * * *

SEC. 14. It shall be the duty of the County Commissioners, in selecting and furnishing to the clerk the number of persons qualified to serve as grand and petit jurors, so to select and arrange that no one person shall come on to the jury the second time before all qualified persons shall have served, respectively, in rotation, according to the best information that can be obtained.—*Political Code of Dakota Territory, chapter* 19, *secs.* 1, 2 *and* 14.

In Dakota Territory, therefore, the jurors are not a picked body of men, as they should be everywhere; but, practically, the entire mass of male citizens in the county. Practically, there is no difference in qualifications for being summoned as a juror and for being called out to work upon the highways. The theory of the Legislature in regard to both matters evidently was, that both sorts of duties were disagreeable necessities, and hence, that the incidence of the burden should have all possible width.

So far as *mental* qualifications are concerned, they are merely that the juror shall be of "sound mind and discretion." This is almost a literal quotation, and is certainly the equivalent in meaning, of the set form with which wills are introduced, to wit: "I, *A. B., being of sound mind and memory.*"

Under this form, it is settled that testamentary capacity presupposes only a low degree of intelligence. Every man, not insane, has it.

So that, in the territory of Dakota, the law in the first place, qualifies every male citizen possessing property,

having the requisite age, not holding certain offices, *and not being crazy*, to do jury duty; and insures the extension of the service to all the persons qualified, by commanding a rotation, which will bring everybody in. It is, therefore, apparent that, in that territory, the right to insist upon the services of the better men who may happen to be drawn upon a particular jury, is an extremely valuable one to the suitor, the taking way of which is liable to work serious detriment.

The argument that for erroneously rejecting a qualified juror, a reversal will not be granted, because the rejected juror would not thereby be recalled, is wholly beside the proposition, which is this: *The right of a suitor to have his cause heard, and its decision participated in, by a juror who has been properly summoned, called into the panel, found without any disqualification specified in the statutes, and not challenged peremptorily by the opposite party, is valuable, and cannot rightfully be taken away.*

The gist of the error lies in compelling the party to submit his case to a jury not constituted according to law, and the remedy consists merely in submitting it to *another* jury, which has been constituted in that way. This is the beginning and the end of the whole matter. The rejected juror is not *necessarily* excluded. He may appear in proper person in obedience to a fresh summons at the next trial. But, whether or not he so appears, whoever appears in his place cannot wrongfully be put aside by the Court, but must be allowed to participate in his trial. It may turn out that the next jury, when impanelled according to law, will be a more or less intelligent body of men than the last; but whatever chances the jury laws offer to parties for securing the services of intelligent as well as unbiased jurors, they should certainly be permitted to retain. If a party sees fit to avail himself of a right which the law has conferred, why may he not do so?

If no other reason than that a party wants him to sit, could be urged for the retention in the panel of a regu-

larly summoned and drawn juror, that would be sufficient reason why such right should not be taken away.

The questions raised and litigated in the courts below, in this suit, are, to all intents and purposes, identical with those since settled by this Court in the following cases :

Strauder vs. *West Virginia*, 100 *U. S.*, 303.
Ex parte Virginia, 100 *U. S.*, 349.
Neal vs. *Delaware*, 103 *U. S.*, 370.

Among the points necessarily adjudicated in those cases, were : *Firstly*, that the rights of suitors in the composition of juries are not limited to the *negative* one, that the biassed and interested shall be excluded, but embrace an *affirmative* one, extending even to the race and color of those who may be admitted; or, in other words, that those rights extend to *who shall be suffered to go on to the jury* as well as to *who shall be put off from it* ; and, *secondly*, that the erroneous exclusion from the jury box of those who should have been admitted forms a ground for reversal.

The Court could not possibly have reached the judgment it did, in either of those cases, without having decided those questions, and in that way.

For example, regard the case of the negro Neal.

There was no pretense that a single juror who had tried him was not qualified under the laws of Delaware, or was not fair-minded between Neal and the State. So far as the record discloses, or any suggestion was made, a more completely unbiassed or unprejudiced body of men, black or white, could not have been collected in the State. If Neal's rights touching the jury by which he was to be tried, were no greater than those the Dakota courts were willing to accord this company, namely, that he could only claim a jury of unprejudiced and disinterested men, then this Court must surely have dismissed his writ of error, because he would have had everything in that connection already which he could claim.

Furthermore, the reversal of the judgment against him and the granting of a new trial did not insure the presence, upon the second jury, of any man of his own race.

The reversal merely gave him a *chance* that some such man would be there, and no more. In this regard, as well as others, that case and this one are entirely parallel. That *chance* constituted one of Neal's *rights*, which it was as much error to deprive him of as it would have been to exclude material evidence in his behalf.

Applying the same course of reasoning to Neal's case, which the the Dakota courts applied to this company, Neal was not injured, because no man is entitled to more than a *fair jury*, anyway; and he could not pretend not to have had that; and, even if he had been injured, the second attempt would not, except as the result of mere chance, secure any different jury from the other.

From the reports of the cases cited, it would seem that this was the very line of argument used in support of the juries. For instance, in *ex parte Virginia*, a dissenting justice used the following line of reasoning, among others:

"The petitioner, J. D. Coles, is the Judge of the County "Court of the County of Pittsylvania, in Virginia, and "has held that office for some years. *It is not pretended* "*that in the discharge of his judicial duties, he has ever* "*selected as jurors persons who were not qualified to serve* "*in that character, or who were not of sound judgment,* "*or who were not free from legal exception*" (*p.* 350.)

In *Neal* vs. *Delaware*, the same eminent justice again dissented, and used like arguments, as for instance:

"It is obvious, that the mere fact that no persons of the "colored race were selected as jurors is not evidence that "such persons were excluded on account of their race or "color. The law only required one hundred 'sober and "judicious' persons to be selected to serve as grand jurors, "and one hundred and fifty such persons as petit jurors, "out of the whole body of the county; and these numbers "may have been selected without any other consideration "than their judgment and fitness to perform jury duty. "*There is no suggestion that the grand jurors by whom* "*the indictment was found, or the petit jurors summoned* "*for the trial, had not the prescribed qualifications, and* "*and were not 'sober and judicious men.'*"

If the exclusion of proper jurors from a panel afterward filled with competent and unbiased men, is such an

error as to justify a reversal, by how much more should such an exclusion, followed by the filling of the panel with men expressly found to have been impassioned or prejudiced, justify it?

The eminent justice who delivered the opinion of the majority of this Court in *Strauder* vs. *West Virginia*, expressed the true notion of what material a proper trial jury should be composed, in the following terms:

"The very idea of a jury is a picked body of men, com-
"posed of the peers or equals of the persons whose rights
"it is selected or summoned to determine, *that is of his*
"*neighbors, fellows, associates*, persons having the same
"legal status in society that he holds."

It was the *possession* of those very relations with the company here, which this Court has said enter into the fundamental notion of a jury of peers, that caused Weaver's exclusion from the panel in this case, and put there, instead of him, the "Pat" Smiths, the "Conn" Maloys, and men of that ilk. It was *because* Weaver held, in a qualified sense, the relation of "neighbor," "fellow," and "associate," with this company; that he was one of its regular patrons, and had frequent occasion to meet its agents and employees, and perhaps its officers, upon business affairs; that caused him to be erroneously looked upon as an unfit person to sit in the trial of a suit to which it was a party. The Dakota Courts wholly misconceived the theory upon which the jury system is founded; and the error they committed in excluding Weaver grew out of that misconception.

Those Courts gave way to the mischievous fallacy, that in suits to which a corporation is a party, the classes having like business interests are not to be represented upon the jury; but that, on the contrary, selections of jurors are to be confined to the classes whose interests are supposed to be in the opposite direction. It is that kind of an error, one which is filling the land with injustice, that this Court is asked to correct in this case.

II.

The trial court erred in denying defendant's motion to dismiss the suit, on the ground that the plaintiff had failed to establish any cause of action against the defendant; and, also in refusing the several requests of the defendant that the jury be instructed to find in its favor.

As the motion to dismiss and the requests for instructions to the jury to find for the defendant, all rested upon the same or related theories, all can most conveniently and appropriately be considered together.

The plaintiff's case wholly failed, for the following reasons, which will be discussed in the order stated, that is to say:

1. *The evidence failed to disclose any omission by the company to do what it had undertaken to do by its contract of hiring.*

2. *The evidence conclusively showed the omission, on Herbert's own part, to do what the circumstances required for self-protection.*

3. *The evidence further conclusively showed that if Herbert's injuries are attributable to omissions on the part of others than himself, such others were persons employed by the same employer in the same general business.*

The following facts appeared from uncontradicted evidence: The cars between whose tops Herbert's leg was caught, were numbered respectively 2,280 and 1,804. On the day of the accident, they had gone west over the road, in a loaded train of from sixteen to twenty-four cars in all, they being themselves loaded. As the train was made up, these two cars occupied a position about two thirds of the way back from the head toward the tail of the train. They were next each other, and were coupled together in the usual way during the greater part of the trip.

When the train had reached a point about thirty or thirty-six miles eastwardly of Bismarck, its place of destination, the couplings between these two cars parted; which, of course, divided the train into two parts. Car 2,280, being in advance, became then the rear car of the front section, and car 1,804, being in the rear, became the front car of the rear section.

As a result of the accident, not only the draftiron of car 1,804 came away, but the "dead-woods" and "bumper," also. These are sticks of timber bolted in pairs to the bottom of the cars; one pair on each end of the car. They are applied one on either side of the draftiron, and far enough apart to admit the placing of the draftiron between them. They usually project about one foot beyond the end of the car, and are united at the outer ends by a cross piece. Meeting corresponding devices on the next car, they serve to keep the two cars separated a distance equal to the sum of their projections, which would commonly be about two feet. When absent, nothing hinders the bodies of two cars brought together endwise from meeting.

The detached sections of the trains were brought together, and the two cars 2,280 and 1,804 coupled with a chain. In this manner the train could be taken into Bismarck, and was taken there.

Such accidents were not infrequent. When they happened out on the road, it was customary to make a chain coupling, and in that manner to take the broken cars to the end of the line, where they could be repaired.

In addition to the loss of its draftiron and bumpers, car 1804 sustained injuries to its brake.

The brake-staff is a perpendicular iron rod, fastened to the end of a car, and projecting both above the top and below the bottom. At the top is a horizontal iron wheel by which the rod is turned. At the bottom is fastened a chain leading backward horizontally to the brake lever. The turning of the wheel at the top winds the chain at the bottom around the staff, and thus draws on the lever.

From the striking together of the ends of the two cars, the bumper of car 1,804 being gone, and hence, nothing being

there to keep the two apart, the brake-staff of 1,804 had become badly bent, and the chain broken. The brake on this car was, therefore, wholly disabled.

The schedule time for the arrival of the train at Bismarck was two o'clock in the afternoon. On that day, however, it was somewhat late.

The crew of men then engaged in handling cars in the Bismarck yard consisted only of Gilboy, the yard master, and Herbert, although one or more other men were similarly employed upon the tracks at the river landing.

No claim is made, however, of any inadequacy of force, nor against Gilboy's competency, or his general carefulness.

A switch engine was employed to move cars about the yard, its movements being subject to the directions of the yard men.

For the repair of cars coming into, or being in, this yard, disabled, or out of repair, the company then employed a car repairer named Quinlan. The evidence does not show whether any other means of doing such work had been provided by the company, either at Bismarck or elsewhere; but it was not claimed that Quinlan himself was not competent and sufficient to repair all the company's cars out of order, promptly and efficiently. Neither was it claimed that Quinlan was not a generally careful man in the performance of all his duties.

Upon the arrival of the train at Bismarck, the engine was removed, and the remainder of the train left standing upon one of the tracks coupled up. Gilboy, the yard master, and Herbert were then at work at the river landing with the switch engine, but Quinlan, the car repairer, who seems to have acted as car inspector also, looked over the train and discovered the breakages in the car 1,804.

These breakages were of such a character as necessarily to be plainly discernible. It required only a glance to detect them.

Shortly afterward Gilboy and Herbert came up from the river landing with the switch engine and a box-car containing passengers.

The train standing there on the track awaiting distribution of the cars was at once observed by both.

What followed, up to and including the moment of the happening of the accident, was narrated by Herbert himself, upon the stand, thus:

"Yes, sir; he started off—Gilboy did—for the numbers "of the train.

"Q. Started off where?

"A. I don't know where he went; he went towards the "depot.

"Q. Did he say what he was going for?

"A. Yes, sir; he said he was going for the numbers of "the train.

"Q. The numbers of what train?

"A. That was this freight train that came in, standing "on the track.

"Q. Then, when you came up from the river with the "passengers there was a freight train standing on the "track?

"A. Yes, sir.

"Q. And it was for the numbers of that train that he "went?

"A. Yes, sir; he says, "You get the engine around "and we will switch the train.

"Q. What train did he mean?

"A. That freight train; so I got the engine around and "coupled it unto the caboose; set the caboose out on the "south side on the caboose track; they have a track to "put them on.

"Q. This caboose you first took hold of was the caboose "fastened to the freight train standing in the yard?

"A. Yes, sir; I set the caboose out and brought the "engine back and coupled on to the freight train; I got "up on the freight train and told the engineer to back up "over the switch; he backed up over the switch; I got "off at the switch; Gilboy was on the hind end of the "train.

"Q. Gilboy was on the hind end of the train—that "would be the front end of the train as it came in?

"A. I was on the east end; he was on the west end; he "got off at the switch; I got off before he got off; I says, "'Ed., will I throw the switch and ride them in, or will I "cut them off?' he says, 'Dick, cut off two cars and ride "them down below the lower crossing;' I cut off two cars "and rode them down below the lower crossing.

"Q. What you mean by cutting the cars off, or cutting "the cars and riding them down was, after they got this "kick——

"A. He pulled the train back over the switch; I went in "between the second and third cars, pulled the pin, and

" got up on top of them; the engineer gave them a push
" so that they went clear below the lower crossing, and I
" rode them clear down below the lower crossing and
" stopped them where he told me to.
" Q. Where was that crossing from where he told you
" to stop them?
" A. Thirty-five or forty rods, I should judge; then I
" stopped them and started back; he kicked in some more
" cars; he motioned for me to catch them.
" Q. He kicked in some more cars?
" A. Yes, sir; on another track.
" Q. While you was down with those first two, Her-
" bert, do you know [how] many he had cut off, or on
" how many different tracks he had switched?
" A. No, sir, I don't.
" Q. When you turned around to come back he had cut
" off two more?
" A. Yes, sir; he motioned to me—like that—to catch
" them; as much as for me to get on top of them.
" Q. Is that what the language mean in your business?
" A. Yes, sir.
" Q. That means to set the break?
" A. To get on and stop them.
" Q. They were coming towards you?
" A. Yes, sir.
" Q. Go on and explain what you did?
" A. I run up and got on them, and tried to set the
" brake on the east car, and I couldn't; the staff was bent,
" and when I twisted it around it would just whirl like
" that; I saw then that the chain was broke.
" Q. Which one?
" A. The chain on the east car.
" Q. That made the brake?
" A. Yes, sir; the chain at the bottom.
" Q. That was on the east car you did this?
" A. Yes, sir; it was a brake that was on top.
" Q. What was the number of that car?
" A. Eighteen hundred and four; then I couldn't set that
" brake; saw the chain was broke; I stepped right down
" on to the other, right opposite, to set that brake up, and
" the dog would not hold.
" Q. The brake on the first car, Mr. Herbert—the brake
" on the first car, you say, was on top; one of these ordin-
" ary brakes?
" A. Yes, sir.
" Q. You have explained about that being broken, and
" that you crossed on to the other car; what kind of a
" brake was it on that?
" A. A step brake.

" Q. Say that's the top of the car; the brake would be " down how far—the step?

" A. Twelve inches ; I think it is a foot or so.

" Q. Well, in order to set such a brake as that, what " have you to do?

" A. You have got to get your foot down there to set it.

" Q. This step that's put there is for that purpose, to " put your foot there?

" A. Yes, sir.

" Q. What do you do with your foot there in setting " that brake?

" A. Put your foot there and set it; here's a dog that " plays into the ratchet; when you turn around the brake " you have to put your foot right against it; you have got " to put your foot against this here dog to hold it, and " turn that around.

" Q. Then the brake couldn't be used or set without " putting your foot down on that step?

" A. No, sir; I tried to set it and could not; the dog " would not hold; wouldn't hold on the ratchet; this ratchet " was worn off smooth, almost, worn off so that the " ratchets in there wouldn't hold.

" Q. So that the brake had become perfectly worth- " less?

" A. Yes, sir; then the hole in the platform was worn " so that the dog would tip up when I set it; would tip " right out.

" Q. Explain that hole in the platform.

" A. This step on which you step down was a board.

" Q. Of what thickness?

" A. Probably an inch and a quarter.

" Q. The dog is fastened to that how?

" A. Bolted right through that with a small bolt—right " through the dog.

" Q. This place through which the bolt was was worn " how?

" A. Worn so that it wouldn't hold--slip right back; " when you set the brake this way it would push the dog " right back, push it against the wood-work; that had " worn out; I tried to set it; I couldn't, the dog wouldn't " hold; I had to hold it; I held it and they struck some " other cars, and the other car came right up against the " top of that car and ketched my leg.

" Q. The track on which these cars were being moved " had on it some stationary cars below where they were " moving?

" A. Yes, sir.

" Q. West of where they were moving?

" A. Yes, sir.

CROSS-EXAMINATION:

"Q. Mr. Herbert, you say you were in the employ of "this company for some two years prior to the time you "went to work for them in the yard here as brakeman?

"Yes, sir.

"Q. You say most of that time you were employed as "brakeman, were you?

"A. Yes, sir.

"Q. Was you brakeman on a freight train or passenger "train?

"A. On a freight train.

"Q. Between Bismarck and Fargo?

"A. Yes, sir; and I also was brakeman on the other di- "vision a few trips.

"Q. A part of the time while you were in the employ "of the company you say you were acting also as fire- "man?

"A. Yes, sir.

"Q. For what length of time did you act as fireman— "what part of the two years you was in the employ of the "company?

"A. Probably five or six months.

"Q. Then you was in the employ of the company as "fireman five or six months, and about a year and a half "as brakeman?

"A. Yes, sir.

"Q. And on a freight train?

"A. Yes, sir.

"Q. How long was you out of the employ of the com- "pany, running a steam thresher, before you re-engaged "to the company?

"A. Well, about two months, I should judge.

"Q. Then, after you had been in the employ of the com- "pany for some two years, you went out of its employ "for about two months, and then re-engaged to the com- "pany again?

"A. Yes, sir.

"Q. The second time you was engaged as brakeman "here in the yard?

"A. Yes, sir.

"Q. Now, a brakeman here in the yard, as I under- "stand it, does not go out on the trains, but remains here "in the yard?

"A. I was working here in the yard.

"Q. You didn't go away from the yard on trains?

"A. No, sir.

"Q. Your business as brakeman in the yard is, when a "train comes in with a great number of cars, to break up

"that train and distribute the various cars of which that
"is composed in the place on the different tracks where
"they are to go?

"A. Yes, sir.

"Q. Also to gather in cars from the different tracks and
"make up the trains?

"A. Yes, sir.

"Q. That is what you and the yard master do?

"A. Yes, sir.

"Q. Your business being local here?

"A. Yes, sir.

"Q. Now, do accidents occur occasionally to cars in run-
"ning freight trains between different leading points—
"say between Bismarck and Fargo; are there accidents to
"cars occasionally?

"A. How is that?

"Q. Do accidents occur to cars, by which they are dam-
"aged, running between Fargo and Bismarck, or any
"other points on the railroad, occasionally?

"A. Yes, sir; sometimes.

"Q. And when an accident of that kind occurs to a car
"on the road, if it is in condition so that it can be run,
"kept on with the train, what is the practice—to leave it
"right where it is or fix it so that you can bring it into
"the station?

"A. When there is a car with the dead-wood and draw-
"bar gone, we always set them out—I always do—at the
"first siding, or else put it behind the caboose and bring
"it in.

"Q. If an accident of that kind occurs, and you can
"fasten it by a chain to the train, and it's in the centre of
"a long train of cars—an accident occurs, and you can
"fasten it by a chain, as you can, and there is no difficul-
"ty to bring it in, you fasten it in that way and bring it
"in, don't you?

"A. I have helped to do such jobs as that.'

"Q. How long a freight train was this that came in
"that day that brought in this broken car?

"A. I could not say.

"Q. Could you tell about how many cars there were in
"it?

"A. I could not; I don't know.

"Q. You found this freight train standing on the track
"when you came up from the river—you and the yard
"master and engineer?

"A. Yes, sir.

"Q. It had come in while you were down there?

"A. Yes, sir.

"Q. About what time in the afternoon was that freight " due?

" A. Well, I don't know; I could not say.

" Q. What time did you come up from the river—what " time in the afternoon?

" A. About 5 o'clock, I should judge.

" Q. What time did you go down to the river?

" A. Well, we went down there in the afternoon some " time; I could not tell; somewhere about 2 or 3 o'clock.

" Q. Came back, you think, about 5 o'clock?

" A. Yes, sir.

" Q. And the train wasn't in when you went down?

" A. No, sir.

" Q. When you came back it was in?

" A. Yes.

" Q. It had come in, then, while you were down there?

" A. Yes, sir.

" Q. Now, this was a freight train that had come in " from the East, was it not?

" A. Yes, sir.

" Q. You can't tell how many cars there were in it?

" A. No, sir.

" Q. Well, was it a long train?

" A. I couldn't say; I don't know how many cars.

" Q. It was standing on the main track when you came " up, was it?

" A. I think it was.

" Q. The same track it came in on?

" A. I wouldn't be positive whether it was or not.

" Q. Had the engine that brought it in been detached " from it and taken away when you came up?

" A. Yes, sir.

" Q. Were there any cars on this track, on this main " track, ahead of these freight cars on the way down to " the river?

" A. No, sir.

" Q. Not any?

" A. For we had just came up from there.

" Q. Well, your business and that of the yard-master, as " soon as the freight train comes in, the first thing you do " is to go to work to break the train up and distribute " the cars around on the various tracks where they be- " long?

" A. Yes, sir.

" Q. As soon as you found this train in, as a matter of " course that was your business and that of the yard- " master to go to work immediately and break up and dis- " tribute the cars where they belonged?

" A. Yes, sir.

" Q. When you saw those cars the yard-master said he " would go and get the number of the cars? Before " breaking the cars up it is the duty of the yard-master to " get the number of the cars that are in the train, and also " the contents of the cars?

" A. I don't know; I never had charge of a yard; I don't " know what their duties is in regard to that.

" Q. Well, this being a freight train, coming in from the " East, it was a loaded train, was it not?

" A. I should judge it was loaded.

" Q. They weren't bringing empty cars in here because " there was no freight here to take East -they were bring- " ing freight from the East out West?

" A. Yes, sir.

" Q. Were there not on this train some cars loaded with " ties?

" A. I couldn't say.

" Q. Well, the first thing you did after the yard-master " went to get the number of the cars in the train, you " went to work before he came back and attached the " switch engine—you brought the switch engine up from " the river when you came up?

" A. Yes, sir.

" Q. That is the engine you moved these cars with?

" Yes, sir.

" Q. You went to work, I suppose—you and the engineer " —and attached the switch engine that you brought up " from the river to the caboose, which was at the hind end " of this freight train?

" A. Yes, sir.

" Q. That you switched off and put off on some other " track, did you?

" A. Yes, sir.

" Q. Then, had you taken off any other cars from the " main train and switched off on any other track before " Mr. Gilboy, the yard-master, came out?

" A. No, sir.

" Q. You had switched off, however, this caboose?

" A. Yes, sir; that's all. Then the yard-master, Mr. " Gilboy, came out.

" Q. You say you asked him whether you should un- " couple the cars and he stop them, or whether you should " stop them and he uncouple them?

" A. Yes, sir.

" Q. He told you he would uncouple them?

" A. He told me to ride them in.

" Q. Now, how many tracks are there here where you " can switch off cars on to—how many tracks are there " here?

" A. I should judge there were about four or five.
" Q. Now, how many cars were switched off, after you " had taken the caboose off; then how many cars were " next switched off?
" A. Of that end of the train?
" Q. Yes, sir; from the hind end of the train.
" A. None at all, sir.
" Q. Didn't you take them from the east end?
" A. No, sir.
" Q. You took them from the west end?
" A. Yes, sir.
" Q. The caboose was at the east end of it, was it " not?
" A. Yes, sir.
" Q. Then, were the cars switched off from the west end " or east end?
" A. The west end.
" Q. Then you moved the entire train to switch them " off?
" A. Yes, sir.
" Q. Now, after the caboose was taken off, after Mr. " Gilboy came out, how many cars were switched off the " west end of the train first?
" A. The engineer pulled the cars back over the switch; " I got off at the switch.
" Q. He moved the whole train eastward?
" A. Yes, sir.
" Q. Moved the train eastward until he passed the " switch?
" A. Yes, sir.
" Q. Until the west end had passed the switch?
" A. That's right.
" Q. Then he started the whole train west again, did he?
" A. I cut off two cars; he throwed the switch, and he " told me to ride them down below the crossing.
" Q. Who throwed the switch?
" A. Ed. Gilboy.
" Q. The yard-master threw the switch?
" A. Yes, sir.
" Q. And you cut off two cars?
" A. Yes, sir.
" Q. And the impetus of the train; that is, I suppose he " moved the entire train against these two cars, and gave " them a shove?
" A. Yes, sir.
" Q. And they run along on the side track?
" A. Yes, sir.
" Q. And you rode down with them?
" A. I staid on top.

"Q. Were these freight cars or loads of ties?
"A. Freight cars, I believe.
"Q. Are you positive about that?
"A. I am pretty positive.
"Q. You are as positive of that as you are of other "matters; do you know what they were loaded with?
"A. I do not.
"Q. Were they stock cars?
"A. I could not say.
"Q. Were they not stock cars loaded with ties?
"A. Well, I couldn't say; I didn't notice them; I didn't "pay any attention to them.
"Q. You rode on the top of those cars down until you "got to the point where they were to be stopped?
"A. Where he told me to stop them I stopped them.
"Q. How many cars were next detached from the "train?
"A. I couldn't say, sir.
"Q. Well, where were the next cars that were detached "from the train; on to what track were they switched— "on the same track these two had run down on?
"A. When I cut off these two cars he gave them a "kick, and I rode them down; he moved the whole train "east again.
"Q. Then there was another lot cut off?
"A. How is that?
"Q. When he moved the train east again you was down "on these two cars that had been sent off; then there was "some more cut off?
"A. I paid no attention; I stopped the cars there where "he told me; there below the crossing.
"Q. Were there some more cars afterwards cut off and "sent off on another track, which you didn't go to?
"A. I couldn't say, sir, whether there was or not.
"Do you recollect?
"A. I do not.
"Q. You don't recollect whether there was some more "cars cut off and sent off on some other track which you "didn't go to stop?
"A. No, sir; I don't know.
"Q. The next thing you did do was to receive a signal "to stop some more cars coming down towards you?
"A. Yes, sir.
"Q. On the same track you had taken the first two cars "down on?
"A. No, sir.
"Q. On what track was it, then?
"A. They was on another track—on the track next to "the main track.

"Q. On which the train stood at first, or was it a track "still further from it than the one you first went down "on?

"A. I think it was the next track to it; I couldn't say "positively; I don't know what track they were on.

"Q. Had there been sent down on this track these two "cars were then going down, any cars from this train "prior to these two going down?

"A. Well, I couldn't say.

"Q. You couldn't say?

"A. No, sir; I don't think there were, they might have "been.

"Q. You had stopped no cars on this track prior to the "two cars that were damaged, where you received the "injury, then? They were the first two cars you had "stopped on the track that these damaged cars were on, "were they?

"A. I don't understand you.

"Q. You have stated that there were two cars switched "off the end of the train and run down the track, and you "rode down with them?

"A. Yes, sir.

"Q. They were the first two cars you stopped?

"A. Yes, sir.

"Q. Did you stop any other cars until you got on to "these two cars where you got injured?

"A. No, sir.

"Q. You say these two cars on which you received the "injury didn't run down on the same track you had taken "the other two cars down on—the first two?

"A. I think not.

"Q. If these two cars that were damaged run down on "a different track from the first two did, of course you "hadn't run down any other cars on the track these two "cars were on?

"A. No, sir.

"Q. Did you see any cars ahead of you on the track "that these two cars went down on that were injured—"any other cars on the track?

"A. Were there any other cars on the track?

"Q. Yes, sir, ahead of you; towards which these two "cars were going?

"A. Yes, sir.

"Q. Well, they were cars that had been standing there, "then—not cars which had been switched on to the track "from this train?

"A. I think they were.

"Q. How many were there?

"A. I don't know; indeed, sir, I couldn't say.

"Q. Box cars, were they?
"A. I think they were box cars.
"Q. Did you take the first two cars that you took down "beyond those which were standing on the track—that "the next two ran against?
"A. Yes, sir.
"Q. So that you saw these other two cars standing "there then, when you went down the first time?
"A. Which other two cars?
"Q. The two cars standing on the track, that were ran "against by the next two?
"A. I don't know how many there was.
"Q. Well, you saw there was cars there?
"A. Yes, sir.
"Q. You say after you had got these first two cars you "took down stopped, you had got off onto the ground "and was coming back, were you, towards the main train "when you saw a signal from Mr. Gilboy to stop these "cars—they had been cut off and was given a shove, were "they not, and coming down the track?
"A. Yes, sir.
"Q. Now, were there two or three cars in that line?
"A. The next cars I ketched?
"Q. Yes.
"A. There was two cars.
"Q. Only two?
"A. That's all.
"Q. Are you sure about that?
"A. I think it was.
"Q. Aren't you mistaken; weren't there three cars cut "off together and sent down?
"A. I think there was only two. I am pretty positive "there was only two, for I got on the east end of the cars "and there was only two brakes.
"Q. The west end of the cars would come to you first, "wouldn't it?
"A. Yes, sir.
"Q. You didn't get up on the cars, then, the first car "you came to?
"A. No, sir.
"Q. You let them pass along until the hind car came "up to you, and then you went up on that?
"A Yes, sir.
"Q. Now, there might have been three cars in that "bunch, might there not?
"A. There was only the two cars.
"Q. Only two cars?
"A. Yes, sir.
"Q. It was this hind car that had been damaged—that

" is, the drawbar had been pulled out, was it not—car " 1804 ?

" A. Yes, sir; that's the one.

" Q. You got up onto that car, did you ?

" A. Yes, sir.

" Q. And went forward to the brake ? The brakes on " the two cars were both at the same end, were they not— " that is, right together ?

" A. Yes, sir.

" Q. You went forward. Did you get up on the hind " end of the car or the forward end of it, as it was coming " west ?

" A. I got up on the east end of it, on the south side.

" Q. When you got up onto the car you had to travel " the length of the car to get to the brake ?

" A. Yes, sir.

" Q. There you attempted, you say, to apply the brake?

" A. Yes, sir.

" Q. And you found the bar of the brake, you say, was " badly bent ?

" A. The what ?

" Q. The staff, or whatever you call it, what you take " hold of to turn it with ?

" A. Yes sir; the brake-staff.

" Q. That was bent, was it ?

" A. Yes, sir.

" Q. How much ?

" A. It was bent enough so that when I would turn it " it would roll right around that way.

" Q. It wouldn't work, then ?

" A. No, sir.

" Q. You looked down to the bottom of the car to see " how it looked, or what the matter was ?

" A. When I turned it around I saw that it was loose— " turned every way; that it wound and turned around " that way. I saw the end of the chain flop right out.

" Q. That chain where—at the bottom of the car ?

" A. Yes, sir.

" Q. How far apart were the two cars then; what was " the distance between the car you were on and the one " right in front of it ?

" A. About the usual distance, I should judge.

" Q. You looked down to the bottom of the car and saw " this chain that was attached to this brake-shaft; you " saw that was loose down there ?

" A. I saw the end of it, when I twisted the brake " around, come out. Then I knew it was no good. I " stepped right over onto the other one.

" Q. Well, now, would the brake work ? Could you

" turn it so as to tighten the chain if the chain had been " all right?

" A. I don't know as I could have tightened it very. " tight. I don't know as I could have tightened it at all.

" Q. On account of its being bent so?

" A. Yes, sir; when I turned it around, where it would " strike where that was bent it might prevent it from " going clear around.

" Q. Whereabouts was that?

" A. In the brake-shaft.

" Q. Whereabouts; near the top of the car or the " bottom?

" A. Oh, it was down a foot or eighteen inches; some- " thing like that; not very far down.

" Q. From the top or bottom?

" A. From the top of the car.

" Q. You don't know whether the bend was sufficient " so that you could not turn it clear around or not?

" A. I do not.

" Q. What is about the usual distance that cars are " apart?

" A. I should judge about two feet, or two and a half.

" Q. You say that the chain that was attached, that " would wind around the brake-shaft, you say that swung " out?

" A. Yes, sir.

" Q. You also saw, did you not, that the two cars " weren't attached in the ordinary way, but by a chain?

" A. No, sir.

" Q. At the same time?

" A. No, sir.

" Q. Now, when this header and gearing in there were " pulled out there would be nothing projecting out at all " from the bottom of that car, would there?

" A. I believe not.

" Q. Be a smooth surface right down?

" A. Yes, sir.

" Q. The whole surface of the car right down would be " a smooth face?

" A. Yes, sir.

" Q. This chain that would be attached to the car would " be fastened to something under the car, and then come " forward and fasten into the car before it, wouldn't it?

" A. Yes, sir.

" Q. That's the way they fasten them that way?

" A. Yes, sir.

" Q. When you looked down and saw the little chain " that whirls around the brake-staff, wouldn't you be very " apt to notice that there was something gone off from the

" bottom of the car, or see that chain that fastened the car
" to the one in front of it?
" A. I didn't notice anything of that kind.
" Q. When you found this brake was so bent, etc., that
" you couldn't turn it, and you saw it was of no use to
" work that, you then stepped right across onto the car
" next to you?
" A. Yes, sir.
" Q. That brake was at the hind end of the car in front
" of you; you didn't have to go clear forward the length
" of the entire car, but just simply stepped right on and
" took hold of another brake that was there?
" A. Yes, sir.
" Q. How fast were these cars moving at that time?
" A. I couldn't say; I should judge—well, I don't know
" how fast—about three or four miles an hour; two or
" three.
" Q. Now, how far did those cars have to go, after they
" were given the push, before they had got down to these
" cars that were ahead of them on the track?
" A. Oh, probably four or five car-lengths.
" Q. Well, how near when you stepped from this
" broken car onto the other—how near had you got—how
" near had the cars got—down to the cars that were stand-
" ing on the track ahead of them?
" A. They had got pretty close.
" Q. Pretty close?
" A. Yes, sir.
" Q. You stepped, then, across onto the other car, and
" that was a car that had what is called a step brake—
" that is, you have to step your foot down onto the step
" that is provided—and commenced turning that?
" A. Yes, sir.
" Q. You found, you say, that the dog would not catch
" in the cogs there?
" A. No, sir.
" Q. And that you had to hold it with your foot?
" A. I didn't say I had to hold it with my foot; I couldn't
" hold it with my foot.
" Q. You say you discovered that the cogs had been so
" worn that the dog wouldn't catch in them, did you?
" A. Yes, sir.
" Q. Well, when you discovered that, what was you
" doing, if you wasn't trying to hold it with your foot?
" A. I had hold of the top of the brake, holding it there.
" Q. Well, your foot down on that step wasn't helping
" you at all to hold it?
" A. I was holding my foot against the dog, and hold-
" ing with the top of it; if I would take my foot away the

" dog would fly right out, and then the brake would go " right off; I was holding it with my foot against the dog, " holding the top of the brake with my hands.

" Q. Then, when you found that the cogs wouldn't of " themselves hold the dog, you kept your foot down there " on the dog to hold it in, did you?

" A. Yes, sir.

" Q. And intended to do that until the cars came up " against the others, or until you got them stopped?

" A. I was trying to stop them.

" Q. I would like to know, right there, whether that " dog was usually set with the foot, and whether it re- " quired the foot, or whether there was a spring or some- " thing to set it?

" A. You have got to set it with your foot; you couldn't " get your hand down there to hold it.

" Q. There was no spring there to set it?

" A. No, sir.

" Q. You had to put your foot down there to set it?

" A. Yes, sir.

" Q. How long had you been working at that brake be- " fore the cars came against those that were in front?

" A. I wasn't very long—not but an instant.

" Q. Had you made a turn upon the brake?

" A. Which one, the step brake?

" Q. Yes, sir; after you got there to it?

" A. Yes, sir.

" Q. How many turns had you made—enough to tighten " it up, to bring the brake's pressure on the wheels before " the car struck the others?

" A. I gave it a turn, and put my foot against the dog, " and pressed it against the ratchet; then turned the brake " and set it up, and let loose of it, and it flew off; then " they struck—just then.

" Q. Struck just as it flew off?

" A. I don't know as it was just as it flew off; I grabbed " it again and tried to set it.

" Q. Now, when it struck against these other cars, this " coupling arrangement of car 1804 being pulled out, there " being nothing to intercept it, it just rolled right up " against the car that you was on?

" A. Yes, sir.

" Q. And your foot being down there between the cars, " it caught your leg in the way you have described?

" A. Yes, sir.

" Question by Juror: How wide was the board you are " talking about?

" A. How wide was the step?

" Q. Yes?

" A. I should judge about that wide. (A foot or a little " less.)
" Q. Projects that much from the car?
" A. Yes, sir.
" Q. Was this brake on the east or west end of the car?
" A. Which brake?
" Q. The brake you was trying to set?
" A. On the east end of the west car.
" Q. On the east end of the west car; then it would be " necessary for you to have your left foot down there to " set that brake?
" A. Yes, sir; I had to put my foot there in order to " hold the dog there.

" CROSS-EXAMINATION resumed:

" Q. You say you noticed, too, that in this step car the " hole through which the brake shaft went had been con- " siderably worn, did you; the brake-shaft went right " through this step your feet was on, didn't it—the shaft?
" A. Yes, sir.
" Q. You say it had been considerably worn?
" A. No, sir; I didn't say that.
" Q. You said something was loose about it?
" A. The hole through the platform of the step brake, " where the dog was bolted through onto it, was the hole " that was wore.
" Q. The dog that had cogs in it was loose, was it?
" A. No, sir.
" Q. The dog, then, was loose?
" A. The dog was loose, rolled back when I set it.
" Q. That you noticed, did you?
" A. Yes, sir; when I set it it flew off; of course, it " wouldn't have flew off if that hadn't been that way.
" Q. When you were standing there by the switch this " whole train passed along east, didn't it—passed by you " eastward?
" A. Yes, sir.
" Q. The entire train?
" A. I got off the switch, got off the train and stopped at " the switch, was going to pull the pin out of the switch " stand, and Ed. Gilboy got off there.
" Q. While you was standing there the entire train was " pulled forward east, wasn't it, so as to bring the hind car " to the switch?
" A. Yes, sir.
" Q. The whole train then passed along in view before " you?
" A. Right in front of me, sir.

" Q. Did you see Mr. Quinlan there, the car repairer, in " the yard?
" A. I did not.
" Q. How?
" A. I did not.
" Q. You didn't see him?
" A. No, sir.
" Q. When you and Gilboy had the talk you have men- " tioned about the part of the work that each should " do, where was this, where were you standing?
" A. At the switch stand.
" Q. That was after you had switched off the caboose " car?
" A. Yes, sir.
" Q. Now, where did Gilboy come from when you met " him; how did you happen to meet; where did you come " from?
" A. I set the caboose out, then coupled onto the freight " train, and pulled it back over the switch; Ed. Gilboy " came up on the hind end of the train; I got off the head " of the train on to the switch; Gilboy was on the hind end " of the train; rode up with the train, and got off at the " switch.
" Q. You were standing there at the switch, then; the " train moving on eastward until the hind end of the train " came there, and then Gilboy got off, he being on the " hind end of the train; he got off, and you and he had the " talk then you speak of?
" A. Yes, sir.

The following uncontradicted testimony of Gilboy throws additional light upon the transactions:

" Q. Were you present at the time of the accident to " the plaintiff on the twenty-fourth of October, 1879; I " think it was the 24th?
" A. Yes, sir; Friday, the 24th, I believe it was.
" Q. What time was that freight train due, if you know, " that came in that afternoon?
" A. I think their regular arriving time was 2 o'clock in " the afternoon.
" Q. State, if you know, what time they did arrive?
" A. They arrived at 3.45 sharp.
" Q. State whether or not you waited any length of " time for their arrival to switch the train?
" A. No, I didn't; as I went to the river something " shortly after dinner, and the train had arrived while I " was absent.
" Q. When you got back to Bismarck, state where and

" how this freight train was that had arrived in your ab-
" sence?

" A. It was on No. 2 track; what we call 'No. 2 track;'
" have our tracks numbered. Train had arrived and was
" standing there when I came up from the river; came up
" on the main line.

" Q. What track would you call the main line?

" A. Well, the main line, to designate it so you would
" understand it, was the second one from the Sheridan
" House, straight track, running right through the yard.

" Q. When you came up who came with you?

" A. Well, I don't remember now anybody in particular.

" Q. Did the plaintiff?

" A. Mr. Herbert was on the engine at the time. Our
" regular engine crew was there, of course.

" Q. Who was the engine crew?

" A. The engineer was Henry Hoffacker, and the fire-
" man was Rust.

" Q. The freight train was standing on No. 2 track, was
" she?

" A. Yes, sir.

" Q. State whether or not the engine that had brought
" the train in had been detached and taken away?

" A. She had been; I didn't see any engine when I came
" up there.

" Q. State so the jury will understadd you—when you
" came what you and Mr. Herbert done with reference to
" this train?

" A. Well, the first thing upon the arrival of a freight
" train it is necessary for me to get the numbers of the
" cars in that train—each car is numbered—to get the
" numbers of those cars, and also the contents of the cars.
" I copy those on the yard-book—what we all call a yard-
" book; every yard-master has a yard-book he uses for
" reference in reference to the cars. I went into the office
" to take a copy of this train. We have what we call a
" receiving book; the numbers of the cars are taken down
" and put on that book, and the contents of the cars are
" taken from the way-bills; a way-bill accompanies each
" car; the conductor has the way-bills with him and turns
" the bills into the office, and those are copied on to our
" freight train receiving book, the contents of each car
" noted opposite to the number. Well, I came up and took
" an exact copy on my book, the same as the one on
" the freight train receiving book; of course that gives me
" information.

" Q. State what the conversation was between you and
" Mr. Quinlan?

" A. Mr. Quinlan asked me what the car contained—

" the disabled car—he asked me what it contained. I told
" him that it was oats for the quartermaster—Government
" oats. I asked him then if he could fix the car. He said
" no; that it would be necessary to unload it before it
" could be fixed. I might have known that without ask-
" ing him, because I am familiar enough to know that.
" I remember of asking him the question at the time.

" Q. Where would you have to take a car loaded with
" Government freight to unload it?

" A. It would be necessary to take it to the river landing.
" The oats were there unloaded in the Government house,
" or, if there was a steamboat there, loaded direct from the
" cars.

" Q. At the time you went there and had this conversa-
" tion, was you and Mr. Quinlan examining this disabled
" car?

" A. He was standing there--had examindd it. I looked at
" it and saw its condition at once.

" Q. What was the condition of the car?

" A. The condition of the car was that the draw-head
" timbers were pulled out of it. The draw-head was gone
" and also the dead-wood. The draw-head timbers are
" the timbers which project from the bottom of the car
" and hold the draw-head in place, and the dead-wood is
" the timber which is directly over the draw-head timbers,
" and fastened directly at the end of the car, in the centre
" of the car directly over the draw-head timbers. Dead-
" wood or bumper. Some people call it the bumper; that's
" a term that's not used much now.

" Q. State how the cars were attached together, if at
" all?

" A. They were attached in the ordinary way by a
" chain— a regular chain which we use for that purpose.

" Q. When you say ordinary way, explain to the jury
" what you mean by ordinary way?

" A. The ordinary way is: There is directly over the
" truck a casting—over the truck in the car. It's very
" similar to the king-bolt in a wagon ; that's about the
" most explicit way you have for a man that is not per-
" haps familiar with cars. Directly over the trucks, at-
" tached to the body of the car, is a timber running the
" full length of the car—I don't remember exactly what
" the name of the timber is—attached to this casting, and
" that casting sets into another one on the truck. The
" car revolves on this, which is necessary in going around
" curves ; and the chains are made—in fact, always are—
" to fasten directly around that centre casting—the end of
" it—and carried forward to the draw-head of the car, to
" which you chain it.

"Q. In front of it?
"A. Yes, sir.
"Q. Is that how this car was?
"A. Yes, sir; that's how this car was; that's the only "secure way of chaining two cars together.
"Q. How far apart were these cars—this car that was "chained to the other car, and the next one to which it "was chained?
"A. Well, I should judge it was about the ordinary "distance the cars would have been apart, provided there "had been two draw-heads—one in each car.
"Q. Now, the dead-wood and draw-bar being gone, it "would leave the end of the car perfectly bare?
"A. Yes, sir; it does; no projection whatever.
"Q. When the dead-wood and draw-head and draw-"head timbers are gone?
"A. Yes, sir.
"Q. Was that all gone in this car?
"A. Yes, sir.
"Q. That would leave the end of the car perfectly "bare?
"A. Yes, sir; perfectly bare—no projection.
"Q. All there was in that distance between the two "cars was the chain on each side as it was attached around "the draw-head of the other car?
"A. Yes, sir.
"Q. Where the bumper is—the dead-wood and draw-"bar are—there was simply the two chains or the one "chain?
"A. Just the chain.
"Q. You say Mr. Quinlan told you it would be neces-"sary to unload the cars before they could be repaired—"to unload that car; what did you then do?
"A. We proceeded to switch the train then.

From Herbert's own statements and the uncontroverted testimony ef Gilboy, therefore, it appears that as soon as the yard crew arrived at the yard, upon their return from the river landing, all of them, including Herbert, at once observed the train standing there, awaiting distribution in the usual way; and all of them at once set about preparations for distributing the cars; that Herbert was sent to the train to remove the caboose, and went there and did so; that before the distribution of the freight cars could begin, it was necessary for Gilboy to go to the office, get the numbers of the cars, ascertain the contents of each, and

then record the numbers, and a notation of the contents of each car in a book kept by himself, called the yard book; that, after this essential preliminary work had been completed, Gilboy went out to the train, and the distribution of the freight cars then first began. In effecting distribution, the engine worked from the easterly end of the train, pulling the entire train, at the beginning of the operation, and after that the cars remaining undistributed, eastwardly, across the switches leading from the principal track to the several receiving tracks, and then pushing them back westward, over the switches, on to the particular receiving track, where each car or group of cars was to be placed in the yard. In doing such work, Gilboy and Herbert usually labored together, alternating in performing the several necessary operations. Sometimes Herbert cut off the cars and turned the switches, while Gilboy mounted the cars, and rode them home; and, at other times, *vice versa*. On this particular occasion Gilboy chose to cut off the cars and turn the switches himself, assigning to Herbert the task of riding them home. While both Quinlan and Gilboy perceived the broken condition of the car 1804, neither of them placed any mark upon it, and neither of them claims to have mentioned the condition to Herbert, although Gilboy claims to have had a conversation with Quinlan about it in Herbert's presence, so that Herbert must have heard it. Herbert denies this; and hence, for the purpose of considering the propriety of the trial Court's rulings upon the request to instruct the jury to find for the defendant, it must be assumed that the conversation, which, it is undisputed, did occur, took place out of Herbert's hearing.

It is, therefore, for the purposes of considering the correctness of the rulings now under view, to be assumed, that Herbert was not notified either by Quinlan or Gilboy, of the broken condition of this car, although both of them had perceived it before the distribution of the train began. It does not appear to have been the practice in that yard to inspect cars for the discovery of defects, which had arrived there from the east, prior to distribution, nor to mark or otherwise point out to the yard men, prior to the distribution, such cars as had arrived in bad order. So far as the evidence discloses, each man, of the

small force in the yard, was expected to look out for himself in respect to such matters.

The evidence disclosed nothing tending to show that Herbert's opportunities for discovering defects in the cars arriving at the yard were inferior to those of either Quinlan or Gilboy.

With respect to the condition of car 1804, which was perfectly visible to any railroad man giving attention to the subject, Herbert's chances for observation were as follows: The caboose, which he was instructed to set out, before the distribution began, was at the east end of the train. In going from the point where the box car brought up from the landing was left, to the caboose, Herbert necessarily passed alongside the train its full length. While Gilboy was engaged in ascertaining and recording the numbers and notations of the contents of the cars in the train, and afterwards in going from the office to the train, Herbert does not appear to have had any demand upon his attention preventing him from looking over the train, to ascertain the condition of the cars. After Gilboy's arrival at the train, Herbert stood at the switch, while the entire train was pulled along in front of him. He does not claim that, during any of these operations, he paid any heed to the condition of the cars, or looked to see whether or not any of them were out of order. Nor does he claim that he could not at once have ascertained the condition of car 1804, had he directed his attention to the subject of the condition of the cars.

While Herbert had worked in this yard but one day prior to that on which he received this hurt, he had been in the employment of the company for a year and a half, as train brakeman, running in and out of this same yard.

Such being the facts, the law applicable thereto will next be considered.

First.—The accident is not attributable to any omission by the company, because:

(*a.*) *The rule of law, making an employer responsible to an employe using machinery for the care of another employe charged with the duty of keeping such machinery in order, is not in force in Dakota Territory.*

(*b.*) ***Even if such a rule were in force there, it would not be applicable to such an employment as Herbert's.***

(*a.*) In those jurisdictions where a master is held liable to a servant, hurt by the use of defective machinery, for the negligence of another servant employed to keep such machinery in repair, such liability is derived from an *exception* to the *general* rule, that, for the negligence of *one* servant, the master is not answerable to *another* engaged in the same general business.

This exception is not founded upon any presumed *rule of public policy*, supposed to forbid the assumption by one man, of the risks resulting from the misconduct of another.

On the contrary, it is treated as a mere matter of *evidence* and of *construction of contracts*.

Those Courts which enforce this exception reason as follows, in substance: A servant employed to use machinery is *presumed*, in the contract, to take upon himself the chances of being hurt by the carelessness of *all other* servants of the same master, and, for the taking of such chances, is to be paid an agreed sum entering into his wages; but, in respect to carelessness on the part of those co-servants who are to keep the machinery in order, *he does not get paid* for taking that risk, and does not, as an *implied* condition of the hiring, assume it.

The presumption, however, that a servant using machinery has not assumed the risk of negligence on the part of those engaged to keep it in order, is nowhere treated as absolute.

On the contrary, it is always held open to rebuttal by the master.

The most *usual* method of effecting such rebuttal is by showing that, after having been duly apprised of the negligence, the injured employe has continued to use the machinery. This mode of rebuttal is always allowed to the master.

By some authorities this conduct of the injured servant is termed *contributory negligence*, by others, *waiver*. The latter term is probably the most accurate; but, whichever term be used, the thing designated is precisely the same,

namely, the presumption arising from the contract of hiring, in its original form, has been overcome.

That the liabilility of a master to one servant, for negligence of another, in respect to keeping machinery in order, is nothing more than an *exception* to the general rule governing the responsibility of the master is demonstrable in many ways.

In the first place, it has been so expressly decided by this Court.

Hough vs. *R. R. Co.*, 100 *U. S.*, 213.

In its opinion in that case, this Court used the following language:

"'The general rule,' said Chief Justice Shaw, in *Far-*
"*well* vs. *Boston and Worcester Railway Corporation*, 4
"*Metc.* (*Mass.*), 49, 'resulting from considerations of
"'justice, as well as of policy, is, that he who engages in
"'the employment of another for the performance of
"specified duties and services, for compensation, takes
"'upon himself the natural and ordinary risks and perils
"'incident to the performance of such services, and, in
"'legal contemplation, the compensation is adjusted ac-
"'cordingly. And we are not aware of any principle
"'which should except the perils arising from the care-
"'lessness and negligence of those who are in the same
"'employment. These are perils which the servant is
"'likely to know, and against which he can as efficiently
"'guard as the master. They are perils incident to the
"'service, and which can be as distinctly foerseen and
"'provided for in the rate of compensation as any
"'other.'"

* * * * * * * *

"It is sufficient to say, that while *the general doctrine*,
"as stated by Chief Justice Shaw, is sustained by ele-
"mentary writers of high authority and by numerous
"adjudications of the American and English Courts,
"*there are well defined exceptions*, which resting, as they
"clearly do, upon principles of justice, expediency and
"public policy, have become too firmly established in our
"jurisprudence to be disregarded or shaken," pp. 215–217.

This Court then proceeded to show that *one of the ex-*

ceptions is the liability of the master for the negligence of employes entrusted with the care of machinery. Such employees, serving, as they do, a common master, in the promotion of a common end, are *fellow servants*, but the *general rule* locating the risk of negligence by one servant in his duties toward another, does not apply to *them*.

Again, this fact appears from the decisions of the Courts in those jurisdictions where the exception has been longest maintained and most rigorously enforced.

On this point it will be useless to consume space in going over the decisions of all the States and territories, where the exception is in force. It will be conceded that the States of New York and Massachusetts stand in the front rank of those which have most uniformly and consistently held to the doctrine of the exception.

The decisions by the Courts of these two States will, therefore, suffice to make the truth on this point appear.

In *Besel* vs. *N. Y. & H. R. R. Co.*, 70 *N. Y.*, 171, one Besel, plaintiff's intestate, *a car repairer*, in the company's employ, was at work in performance of his duty under a car standing on a repair truck. Other cars on the same truck were being drawn away by an engine, when a coupling-pin broke, and the cars, thus disconnected, ran back, struck the cars remaining, and put in motion the one under which Besel was at work, whereby he was run over and killed.

There were a head brakeman and three others on the train which was moving the cars, but none on the detached cars, and not the usual number on top of the moving cars. It did not appear that a sufficient number of brakemen had not been employed, nor that those employed were incompetent. The yardmaster employed the men who distributed the cars, but not the car repairers. These worked together, and when cars were ready to be moved one of them gave notice to the men having charge of the engine. The head brakeman had immediate charge of the starting and distribution of the cars. ***The Court held the head brakeman and the yard master to have been the co-employes of the car repairer, for whose negligence, if any, the company was not liable.***

In *King* vs. *Boston & Worcester R. R. Co.*, 9 *Cush.*, 112, a *fireman* of a locomotive engine was held the fellow servant of those *employed to construct switches* on the tracks of the railroad.

In *Gilshannon* vs. *Stony Brook R. R. Co.* 10 *Cush.*, 28, and in *Seaver* vs. *Boston & Maine R. R. Co.*, 14 *Gray*, 466, *a laborer is employed to repair a roadbed*, and *a carpenter employed to repair bridges*, were held fellow servants with the *trainmen*, in charge of the train on which they were taken to and from work.

In *Gilman* vs. *Eastern R. R.*, 10 *Allen*, 233, and 13 *Allen*, 433, a *carpenter employed in the repair shop* was held the fellow servant of a *flagman* and *switchman*, by whose negligence a train, upon which the foreman was riding to and from his work, was derailed.

In *Holden* vs. *Fitchburg R. R. Co.*, 129 *Mass.*, 268, a *freight brakeman* and a *track repairer*, by whose negligence a derrick had been dangerously placed, were held fellow servants.

In *Walker* vs. *Boston & Maine R. R.*, 128 *Mass*, 8, a *road master*, by whose negligence, in leaving turned on to side track a switch he had been repairing, a train was derailed, was held the fellow servant of the *train men* in charge of the derailed train.

In each and every of these cases this state of facts existed: *A servant charged exclusively with the duty of keeping machinery in repair was hurt by the negligence of another servant charged exclusively with the duty of using the same machinery, or vice versa;* for tracks, bridges and switches are, in respect to the responsibility of the master, to be viewed in the same light as cars or locomotives.

In *Besel* vs. *N. Y. C. & H. R. R. Co.*, not only did this general fact exist, but, in addition thereto, the special fact, that the servant injured was actually busied in the discharge of his exclusive duties as repairer of machinery, when the servants belonging exclusively to the other class committed their fault.

Now, if a brakeman moving cars in a yard be the fellow servant of a car repairer actually at work underneath

another car, it must be that the latter is the fellow servant of the former likewise, and that they mutually are the fellow servants of each other.

But this could not be true if they were engaged in a *different* service. If the employment of keeping railroad machinery in order be a separate and distinct one from that of using the same machinery, then those engaged in the two employments respectively must be strangers. and not fellow workmen, and the negligence of the one is not that of a fellow servant as to the other. If Besel, at work underneath his car, was a fellow servant of the operating men, and Besel assumed the risk of the operating men being negligent in the performance of their work, but the operating men did not, on the other hand, assume the risk of Besel doing his work negligently, such a state of things could *only* exist by means of *an exception* to the *general* rule, that a servant assumes the risk of negligence on the part of fellow servants.

Walker vs. *Boston & Maine R. R. Co.* affords another excellent illustration.

No State has gone further than Massachusetts in holding that for negligence in maintaining track and track apparatus the company is responsible to trainmen injured thereby. Hence, in that case, if the road-master, instead of leaving the switch turned on to the side track, after having repaired it, had made the repairs so negligently that the switch had broken when the train passed over it, causing a derailment similar to that which actually occurred, undoubtedly the injured trainmen would have been permitted to recover, instead of having been nonsuited, as they actually were.

Such a result could not have come from the sustaining by the roadmaster of a *dual* relation—from his belonging *both* to the operating department and that charged with the maintenance of way. Nothing appears from the report of the case to indicate that this road master had any different office to perform on this road from that exercised by such employés customarily, to wit, to keep the way and plant in order for use by the operating department of the company. Hence the decision could not logically be founded upon any other principle than that there is a *general* rule with *exceptions.*

The *general* rule was applied in this particular case.

The *exception* would have been applied had the switch broken, instead of having been left turned on to the side track.

The Courts of these States have, in their opinions in cases recognizing and enforcing the liability of the master to a servant who has sustained injuries by the negligence of a fellow servant entrusted with the duty of keeping machinery in order, been compelled to admit that the employé who selects machinery and keeps it in repair, and the one who uses it, are fellow workmen.

Thus, in the leading case, *Laning* vs. *N. Y. C. R. R. Co.*, 49 *N. Y.*, 521, Folger, *J.*, in delivering the opinion of the Court, said :

"It is said that if two servants are in the employ of the "same master, engaged in the same common enterprise, "and performing duties and services for the same general "purposes, the master is not liable. Now, it is apparent, "the agent who selects a machine to be used in the busi- "ness of the master, speaking generally, is in the em- "ployment of the same master. He is engaged in the "same common enterprise, and performing a duty and a "service for the same general purposes of the master. "And so of the agent who selects and hires men to act "in that business. It is necessary for that business to "aid the common enterprise, and to advance those gen- "eral purposes, that machines should be had and men "hired, and the agent who attends thereto performs a "service to that end."

P. 530.

In view, therefore, of what has often actually been decided by the Courts of New York and Massachusetts, expressions sometimes occurring in cases adjudged by those Courts, to the effect that a servant charged with the duty of selecting and repairing machinery is not to be deemed the fellow of one charged with the duty of using such machinery, in the true sense of the rule, excepting the master from liability for one servant's negligence towards another, must be taken to mean no more than this : that negligence in selecting or repairing machinery *is to be ex-*

cepted out from negligence generally in determining the liability of the master therefor.

Hence the declaration of this Court in *Hough* v. *R. R. Co.* must be taken as the only true or logical exposition of the ground upon which the responsibility of the master for the safe condition of machinery, whose selection and repair are necessarily left to others, can be based.

As the question of the master's liability to the servant for such negligence is necessarily a thing of very large consequence to both, it is manifest that the limits and extent of the liability should be *certain and easy of application.*

But it is a lamentable fact that no branch of the law is more difficult or uncertain. Doubts, embarrassments and conflicts of decision constantly occur.

Enlightened Courts professing, and conscientiously striving, to administer the same body of jurisprudence, come to the most discordant conclusions.

The result has been a constantly swelling flood of experimental suits poured into the Courts throughout the country.

In many States and territories relief from these troubles has been sought in legislative enactment.

In a number this effort has taken the direction of statutes abolishing the general rule and setting up the former exception in its stead. In such States, while a better understanding of mutual rights and obligations has been brought about, it is to be presumed that the financial equilibrium has been restored, by a general reduction of wages, corresponding with the decrease in the risks which the servant assumes.

On the other hand, the simplification of the law has taken, in other jurisdictions, a different direction—the general rule has been declared to be the law, and the exception been discarded.

In these latter jurisdictions it is to be presumed that the financial equilibrium has also been restored by such increase of wgaes as suffices to compensate for the slightly increased risks assumed by the servant; for those in a position to know the facts are aware that but a tri-

fling percentage of the accidents happening to employés of the larger industries using machinery result from defects therein.

Among the jurisdictions moving on the latter lines is the territory of Dakota.

That territory, in its efforts to frame a statutory code, which should contain a complete body of substantive laws, dealt with the vexed question of the liability of a master to a servant.

The enactment upon that subject is in the following terms:

"SEC. 1129. An employer must indemnify his employé, "except as prescribed in the next section, for all that he "necessarily expends or loses in direct consequence of the "discharge of his duties as such, or of his obedience to "the directions of the employer, even though unlawful, "unless the employé, at the time of obeying such direc- "tions, believed them to be unlawful."

"SEC. 1130. *An employer is not bound to indemnify his "employé for losses suffered by the latter in consequence "of the ordinary risks of the business in which he is "employed, nor in consequence of the negligence of another "person employed by the same employer in the same "general business, unless he neglected ordinary care in "the selection of the culpable employé.*"

"SEC. 1131. An employer must, in all cases, indemnify "his employé for losses caused by the former's want of "ordinary care."

Civil Code of Dakota, Secs. 1129, 1130, 1131.

By force of section 6 of the Civil Code, herein before quoted, the common law upon the subject of the liabilities of masters to their servants has been superseded in Dakota Territory, and the *whole law* upon that subjec is to be found in the above sections. If any rule of the common law has not been embodied in these sections, it must be deemed to have been purposely omitted therefrom, and to have been expurgated from the jurisprudence of the territory.

It will be observed that while section 1130 embodies the *general rule* of the common law, it is silent regarding

that exception making the master liable when the subject of the neglect by one servant is the condition of machinery to be used by another.

It is, however, of high importance to observe that *one* of the *two* or *three* exceptions from the common law rule *has* been incorporated with this section of the Civil Code.

Side by side with the exception relating to machinery, the Courts have ranked *another one*, to the effect that the general rule shall not apply unless there has been exercised due care in the selection of the guilty servant. If there has been neglect of this character, the general rule fails to operate and the master becomes liable.

This exception the Legislature has thought it wise to retain. Its retention proves that the Legislature had specifically under view the subject of the common law exceptions to the general rule, *and decided to retain this one only.*

Had section 6 of the Civil Code not been enacted, the maxim, *expressio unius*, &c., would have excluded *all other* exceptions from the jurisprudence of the Territory.

It is further to be remarked that the Dakota Legislature, in the choice of terms, has taken great pains to avoid the use of one whose uncertainty and indefiniteness have caused most of the confusion and difficulties experienced in administering the law upon this subject.

The term "*fellow servants*" is the one referred to. The struggle on the part of the Courts has been to ascertain, in each particular case, just who were fellow servants; and the most conflicting deductions have been drawn in the various States and Territories, whose Legislatures have not been wise enough to settle the point by statute.

This vague term "fellow servants" has, with great foresight, been omitted by the Dakota law makers; and, instead thereof, the expression chosen, "PERSON *employed by the same employer in the same* GENERAL *business.*"

Of course there can never be any difficulty in ascertaining whether or not the one guilty of negligence, resulting

in the injury of a servant, is a "*person*;" nor whether such "person" was, at the time of the commission of the fault, "*employed by the same employer*," nor whether such employment was in "*the same* GENERAL *business.*"

The Courts have never been troubled to ascertain or define the limits of a "general business;" nor to ascertain whether the guilty and the injured parties were employed therein. It would be unreasonable to expect any considerable difficulty in solving such simple problems.

The Dakota Legislature has, therefore, laid down an easy and simple rule upon that which is so doubtful and uncertain in other jurisdictions. It is this:

Provided due care has been exercised in the selection of an employé, the master is not responsible for the consequences of his negligence to another person employed by him in the same general business.

Another significant point is to be noted, in connection with the exception, reserved in section 1130, to the general rule thereby declared.

The Legislature has not limited the negligence in selection, which will make the master responsible, to the *immediate act* of the master. *If anybody*, whether the master himself *or a subordinate*, entrusted with the selection omits due care in its performance, a liability on the part of the master arises. Furthermore, the term "selection" cannot reasonably be restricted in meaning to an original hiring. The *hiring* of a servant may take place but once; but his *selection* to perform specific duties is an incessantly recurring matter; so that the Legislature has chosen the precise terms necessary to constantly protect the employee against perils arising from negligently selected coworkers for accomplishing the general results which the common master has in view.

It would be sufficient, to entitle these sections to the credit of forming a masterpiece of legislative wisdom, that they have substituted for the mazes of a labyrinth a broad, straight and open avenue, wherein no man can lose his way.

Under these rules the servant knows his risks, and the master knows his responsibilities at the outset; and hence both are able to adjust the rate of compensation accurately to the perils as well as the exertions which are attendant upon the employment.

All Courts, which have held the master exonerated from the consequences of one servant's want of care toward another, including this Court, have put the existence, as well as the justice of the rule, upon the simple ground, that *the servant has been paid for encountering the risk.* It has universally been regarded as a mere matter of dollars and cents.

No good reason has ever been suggested why the same principles are not just as applicable in those jurisdictions where the risks assumed by the employé are either greater or less than at the common law. Where they are *less*, the *master* is recouped by a reduction of wages; where they are *greater*, the *servant* is *indemnified* by an increase of wages. In *any* case, whether the quantity of the risk be less than, equal to, or greater than that determined by common law rules, the rate of wages can, with perfect certainty, be assumed to adjust themselves to that quantity; so that if in the Territory of Dakota an employé assumes a greater quantity of risk than in Massachusetts, there need not be the slightest fear but that he will get more for assuming it.

Furthermore, the rule of the Dakota Code has the merit of being perfectly *reasonable* and *logical.*

Firstly. It makes the master liable to the servant for the consequences of *his own personal* want of ordinary care. *Secondly.* It makes him liable to all his *other* servants for want of ordinary care in the selection of one to work in the same general business with them.

Of what *other* kind of *negligence* can a master possibly be guilty towards a servant? If a master uses due care in selecting two servants, and sends them out to busy themselves in the same or different departments of a general business, and one of them negligently hurts the other, how can it truthfully be said that any omission *by the master himself* caused the hurt?

Rules of law may make a master a *guarantor* or an *insurer* of one servant against the carelessness of *another;* but it is bald fiction to say that the master has himself been negligent, when the fault has occurred out of his presence, and the guilty party has been carefully selected to perform his task.

The application of these code provisions to the facts of this case disposes of it in favor of the company, without the slightest difficulty.

It is assumed on the part of Herbert that *some* servant of the company, employed by it for the purpose of keeping these cars in order, neglected his duty in that regard, and that the accident is attributable to such neglect.

As a matter of fact, it is known precisely who the servant was that had been employed by the company for the purpose mentioned. It is also known that he was there on the spot when the train arrived, prepared to do whatever might be necessary in the premises. It is not claimed that any want of care was exhibited by the company in selecting and assigning this servant for the performance of the work. He was adequately skillful, and had abundant capacity to do everything required for putting these cars into the most safe and perfect condition. In this case, therefore, we know exactly what servant it was who was neglectful in making repairs about these cars, if anybody was neglected.

But the result would be the same, if those facts had not appeared. If the identity and locality of the servant selected by the company to do this work had not been disclosed, it could not have been charged against the company, concerning him, that he had not been selected with due care, or was not adequate to efficiently perform his duties; because nothing of the kind has been alleged by Herbert.

Whether such employee was Quinlan, at Bismarck, or some other unknown person, at some other unknown place, he was a "*person;*" he was "*employed by the same employer.*" This much will not be disputed.

Furthermore, that he was "*employed in the same general business*" with Herbert, is equally indisputable.

What was the *general business* in which Herbert was employed? Manifestly, the business the railroad company was engaged in carrying on. What was that business?

Plainly, the transferring of persons and property from one place to another.

The transaction of that business required the use of certain instrumentalities. These consisted in part of rolling stock, and a track over which to move the same.

The purchasing of the instrumentalities and the use of them when furnished, were all departments of one industry; all of them were co-ordinate branches of one general business.

Such being the case, the servants of the company entrusted with the duty of furnishing and keeping in order the instrumentalities, and those entrusted with that of using them, were all "persons employed by the same employer, in the same general business."

Hence, the risk of being injured by the neglect of other servants of the company, charged with the duty of keeping in repair the machinery, which he might be called upon to use, was one which Herbert himself assumed; it neither being alleged nor proven that such other servants were insufficient in numbers, inadequate in skill, or generally neglectful.

Nothing could be more erroneous than to suppose that this case falls within the scope of section 1131 of the Civil Code, instead of that of section 1130.

This legislature, in treating of the subject of the master's liability for negligence which has worked harm to a servant, has, logically, divided that subject according to the facts. But *two* species of that kind of negligence are possible:

Firstly, that of *other servants* entrusted by the master with some branch of the *general* work; and, secondly, that of the *master himself* when he attempts to conduct some part of the business in *his proper person.* The Legislature made the *former kind* of negligence the sub-

ject of section 1130, and the *latter kind* that of section 1131.

In practice this can never lead to the least uncertainty, or even unfairness toward the servant. The two rules laid down in the two sections are perfectly simple, and incapable of being misunderstood. Whenever the master undertakes to do anything *in his own proper person*, and does it negligently, he is responsible. This is precisely the same as at common law. If a man hires two wood cutters and goes out with them to fell trees, and, by the carelessness of himself, a tree falls upon one of the servants, the master is liable; while if the three are working together, and a precisely similar omission upon the part of one of the servants occasions the fall of the tree, the master would not be liable.

Where, instead of *personally* undertaking certain parts of the common work, the master entrusts them to servants, and such servants have been selected with ordinary care, the neglect of such servants is not under the Dakota Civil Code *in any case* to make the master responsible.

The common law is precisely the same in this regard also, *except where such duties relate to the procurement or repair of the physical instrumentalities for carrying on the business.* If they do so relate, at common law the master is deemed to be *an insurer* that they will be carefully performed.

Under the Dakota Civil Code where the employer engages in person in carrying on any branch of the general business with whose operations the servant will be brought into contact, the latter does not assume any risk of those operations being so negligently performed as to imperil his own safety.

On the other hand, where the employer does *not* hold himself out as undertaking to do certain parts of the business in proper person, but openly entrusts those parts to employees, *other* employees do assume risk of the former doing their work carefully.

There can never be any obstacles to the ascertainment

by the servant hiring of the precise facts as to what parts, if any, of the business of the employer will conduct in person, and what parts he will entrust wholly to other employees.

In respect to those entering the service of railroad concerns, it would be merest fiction to assume that any one of them would not know perfectly well what parts of the corporate business would be carried on by the immediate corporate body, and what would be carried on by means of "persons employed by" it "in the same general business."

In particular no one of them would go into the service resting under the belief that the freight cars would be kept in repair in stockholders' meeting, or even under the eye of the Board of Directors or managing officers.

Every man entering railroad service knows perfectly well that the inspection and repair of freight cars is, in all railroad concerns, entrusted to employees of ordinary rank, like Quinlan. Hence, all brakemen, and others entering railroad service, are perfectly aware of the precise extent of the risk of this kind which they are taking to themselves.

There does not enter into this view of the law any difference between corporations and natural persons.

If a man living in Europe and carrying on manufacturing or transportation business in Dakota Territory, should, by reason of his non-residence, entrust every department of that business to resident employees, the rule would apply to his case in its fullest extent. Nobody entering his employment would have any right to expect the master to be personally looking after his safety. Everybody entering it would fully understand that the whole business was in the hands of himself and other employees; and that to himself and his co-employees, alone, was entrusted the common safety of all.

The main reason why railroad concerns entrust the repair of freight cars and similar work to subordinate servants does not arise from the fact of their corporate character, but from the magnitude of their business. The

same plan would have to be adopted if the owners of the roads were natural persons instead of corporations.

The summing up, then, of the whole matter on this point is this: Herbert's hiring and service were wholly within Dakota Territory; he had no reason to suppose, and cannot be taken to have supposed, that the repair of the freight cars which he would be called upon to handle would be looked after by any one save other "persons employed by the same employer in the same general business;" hence, the rule laid down in section 1130 of the Civil Code controls this case.

(*b.*) *Even if the exception to the general rule, engrafted thereon by the common law, existed in Dakota Territory, that exception could not apply to Herbert's case.*

There is no resemblance between the case of putting into the hands of train men, a train of cars ready to start out upon its run, or even placing in the hands of yard men, cars to be made up into a train for starting upon its run, and that of the placing in the hands of the latter a train of cars, which has just arrived at a terminal yard, as its ultimate destination, for distribution.

Where cars are turned over to be made up into a train, or the train having already been made up, for starting out upon the road, there may be some ground for the employee into whose hands such cars have been placed, to presume that such cars would not have been turned over to him for active service unless their condition were such as to enable them to perform such service, efficiently and safely.

But, where the *contrary* is the case; where the wear and tear of the journey has been but recently suffered; and the hard usage of the run has just been encountered, there can be no presumption of the kind. On the contrary, the presumption must be the opposite in all cases. Hence, even those Courts which hold most strongly to the common law exception to the general rule, make a distinction, and hold the exception inapplicable to cases of the latter character, of which the case at bar was one.

The cars in this train had not been put into Herbert's

hands as fit to do service upon the road. On the contrary, they were turned over to him that they might be placed for unloading, so that the requisite repairs could be ascertained and executed. The following cases are decisive on this point:

Yeaton vs. *Boston and Lowell R. R. Co.*, 135 *Mass.*, 418.
Gibson vs. *Nor. Central R. R. Co.*, 22 Hun (N. Y.), 289.
McCosker vs, *L. I. R. R. Co.*, 84 *N. Y.*, 77.
Flanigan vs. *C. and N. W. R. R. Co.*, 45 *Wise*, 98.
Flanigan vs. *C. and N. W. R. R. Co.*, 50 *Wise*, 462.
Brick vs. *Rochester, N. Y. and Penna. R. R. Co.*, 98 *N. Y.*, 211.

Second.—The accident resulted from Herbert's own carelessness.

The evidence showed conclusively that Herbert knew the train to have just arrived in the yard, after having encountered the perils, and endured the wear and tear of the road. It did not appear, from the evidence, that the company had specially provided any servant, whose exclusive duty it should be to look after the safety of the other workmen in the yard. Naturally in *every* such place, there must be *some* employee who must rely upon *his own* vigilance. For, even if the company should provide one or more men to look after the safety and security of all the rest, who would look after theirs? They would have to look out for themselves, and, if they got hurt, it would necessarily be attributable either to their own want of care, or that of their fellows or subordinates.

The arrangements that a railroad concern would usually be expected to make for apprising yard men of dangers of the character here being considered, would depend upon the number of employees engaged, and the amount of the business transacted in the yard. If the yard were large, and a great number of cars being con-

stantly handled therein, and a large number of men employed, it might reasonably be expected that to some one or more employees the duty would be specially assigned of watching for such perils, and notifying the other servants who might encounter them.

But this was not a yard of that character; but three men, all told, sufficient for all the work of all the branches to be done therein.

Under this condition of things, each man could reasonably be expected to ascertain and know the existence of such perils; because no one man would have any better opportunity for doing so than any other.

In this case, it cannot be for an instant claimed that Herbert's opportunities for learning the condition of every car in the yard were not quite as great as those either of Quinlan or Gilboy. Hence, it would be as justifiable to say that Gilboy had a right to expect Herbert to look out for Gilboy's safety as the opposite.

No rules or course of practice in the yard had misled Herbert upon this point. He had no right to expect, and could not have expected, that either Gilboy or Quinlan would relieve him from the occasion to see and know for himself the condition of the cars he was called upon to help distribute. Hence, if he had an opportunity for learning the broken and dangerous state of car No. 1,804 before he placed his leg between it and car 2,280, he was bound to use that opportunity, and must be held chargeable for all that an appropriate examination thereof would have revealed to him.

Now, Herbert was an experienced railroad man. He well understood the nature of the perils to which freight cars are subjected in their runs over the road. He must have known that *one* of those perils is the loss of the draft iron and bumpers. As an experienced railroad man, he must, likewise, have known that the effect of such a loss is to allow the end of the damaged car to strike that of the adjacent one, if, by any means whatever, the momentum of the former is checked. Knowing that these cars, forming part of this train, had recently been exposed to this peril, it was his duty to assume that every car in the

train had sustained the injury, and to first satisfy himself that the ordeal had been safely passed before exposing his limbs to destruction, if it should turn out to the contrary.

Herbert's opportunity for ascertaining this defect in car 1,480 was ample. It was nothing which required to be searched for by any railroad man. It could be detected by a glance. To an expert like Herbert, this car was as an ox with one horn knocked off would be to a cowherd. No pretension that the break was not perfectly easy of discovering is made.

Herbert passed the full length of the train, and alongside this car, in going to disconnect the caboose. The whole train was drawn in front of him while he was standing at the switch. The interval of time between these operations must also have been considerable. Had he looked for defects this one must have been discovered in an instant. He was negligent in not looking, and hence all his subsequent troubles arose.

Third.—If Herbert was not hurt through his own neglect, it was through that of his fellow servants.

Herbert, Gilboy and Quinlan were all fellow servants, working together in the same yard, to accomplish the same ends.

Hence, each one assumed, by virtue of his employment, the risk of being hurt through the negligence of the others.

The fact that, in their common employment, Gilboy was superior in authority to Herbert, makes no difference.

McCosker vs. *L. I. R. R. Co.*, 84 *N. Y.*, 77.
Brick vs. *Rochester, N. Y. and Penna. R. R. Co.*, 98 *do.*, 211.
Crispin vs. *Abbot*, 81 *N. Y.*, 516.
Besel vs. *N. Y. C. and H. R. R. Co.*, 70 *do.*, 171.
Gibson vs. *Nor. Cen. R. R. Co.*, 22 *Hun*, (*N. Y.*), 289.

Murphy vs. *Boston and A. R. R. Co.*, 88 *N. Y.*, 146.
Yeaton vs. *Boston and Lowell R. R. Co.*, 135 *Mass.*, 418.
Walker vs. *Boston and Maine R. R.*, 128 *do.*, 8.

The sole cause of the injury was the absence from car 1,805, of any device which would prevent that car and 2,280 from closing together like the blades of a pair of shears, in case the speed of the former car, which was in front, should be checked by any cause, whether the setting of the brake or something else.

The pretence that the worn condition of the brake dog and ratchet on car 2,280 was, in any degree the occasion of the hurt, is too remote and far-fetched. The hurt was effected solely by the contact of the tops of the two cars, and that contact resulted solely from the absence of the draw-head and bumper.

If the checking of the speed of car 2,280 had been accomplished by the setting of a perfect brake, there being nothing to simultaneously check that of 1804, it would have run up against car 1,804, just the same, and have caught Herbert's leg precisely as it was caught.

The defect in the brake dog and ratchet of car 2,280, was nothing tending to imperil those handling the car. It was not negligence to put such a car into a train with a large number of other cars each, so far as has been made to appear, provided with an effective brake, and run them over the road from Fargo to Bismark. Neither was it negligence, after the car had arrived in the Bismarck yard, in the train, to distribute it with the rest. There certainly could have been no duty on the part of the company to leave the car on the track, where it stopped on arrival, until repaired, if repairs were needed. To have done so would have been to keep the residue of the train there also, because all the cars had to be moved in order to distribute any.

If it could be deemed incumbent on the part of the company to have some employé present at the train be-

fore distribution began, in order to examine the cars and ascertain their condition, so as to be able to warn Herbert of any danger to which he might be exposed in handling the cars, that duty was amply discharged. The company had *two* such servants upon the spot—Quinlan and Gilboy. Both of them were not only there, but both ascertained the facts in respect to the car which worked the damage in ample time to have warned Herbert.

If either Gilboy or Quinlan had informed Herbert of the facts which his own gross negligence had caused him to overlook, it is to be presumed that Herbert would not have put his leg between the cars.

Undoubtedly, the omission of Gilboy and Quinlan to impart to Herbert information of the defect which they themselves possessed, after Herbert had negligently omitted to look for defects himself, occasioned the exposure of the limb and its consequent destruction.

Hence, the accident was the result of the negligence of Herbert's fellow servants, Gilboy and Quinlan, in not advising him of the danger about which they knew.

Walker vs. *Boston and Maine R. R. Co.*, 128 *Mass.*, 8, is precisely in point. There, by reason of a roadmaster having negligently left a switch turned on to a side track, an express train, running at a high rate of speed, was diverted from the main track and ran upon the side track. The ties and sleepers of the side track were so weak and rotten as to give way, and occasion a derailment, which wrecked the train. Upon suit brought against the company by some of the trainmen who had been hurt in the accident, it was adjudged that, notwithstanding the condition of the side track, the accident must be regarded as having been occasioned by the negligence of the roadmaster in turning the train upon it, and not that of the corporation itself in suffering the side track to become dilapidated.

Another view of the facts can, with perfect correctness, be taken, leading to exactly the same results.

The train altogether consisted of from sixteen to twenty-four cars. On the journey, the accident to car No. 1804 disabled its brake. With the exception of the brakes on

the two cars, 1804 and 2280, all the others in the train were perfect. Hence, notwithstanding the defects in the brakes of these cars, if the cars, in distribution had been grouped in any other way than that in which they were, the accident would have been absolutely impossible. If those two cars had been uncoupled, and each of them left to form part of another group, manifestly they could not have come together, and Herbert's leg could not even have been gotten between the two.

The company provided an ample number of perfect brakes with which to distribute every car in the train, and it was solely the fault of Gilboy, who controlled the grouping of the cars for distribution, that they were not grouped in a manner to insure safety. Looked at in this light, it was a case where abundant safe apparatus was placed by the company in the hands of its yard men, but, by the carelessness of one of them, instead of the use of the safe apparatus, other apparatus, which proved to be unsafe, was selected.

This was, likely, one or the views taken by the Supreme Court of the State of Massachusetts of the case lastly above mentioned. The company had provided a perfectly safe track upon which to run the express train, but, by the negligence of a fellow-servant of the train men, the train was diverted to a side track which was unsafe.

These cars, by the use of any one of many other obvious modes of handling in the yard, could have been moved about, even in their damaged condition, with perfect absence of peril to any one. That none of those modes was adopted, was the fault of Gilboy, who was perfectly conversant with the facts making it incumbent upon him to do so.

But, Gilboy was Herbert's fellow servant, and the liability of Gilboy to make such blunders was precisely one of the risks which, by his employment, the latter assumed.

III.

The only other errors of the trial Court to which it will be necessary to specifically call the attention of the Court in this place, were its refusals to give to the jury the instructions quoted in the fourth and seventh assignments of error, *ante* pp. 4, 5.

Under any view of the law the company was, under the evidence, entitled to each of those specific instructions; and the failure to give them was clear error. If no other errors appeared upon the record, either of these would reverse the case.

Crispin vs. Abbott, 81 *N. Y.*, 516.

GEORGE GRAY,
W. P. CLOUGH,
for Plaintiff in Error.

Supreme Court of the

OCTOBER TERM, 19[illegible]

No. [illegible]

NORTHERN PACIFIC RAILROAD COMPANY,

vs.

CLAYTON D. HERBERT,

BRIEF FOR DEFENDANT IN ERROR.

THOMAS [illegible],

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

CLAYTON D. HERBERT,
Defendant in Error.

No. 87.

Brief of Counsel for Defendant in Error.

The Plaintiff below at the time of the injury complained of was brakeman on the road of the Defendant in its yard at Fargo. In the performance of his duty he was required to ascend and stop with the brakes two cars which were switched onto and moving along the track. On account of defects in the braking apparatus on both of the cars, he was delayed and prevented in setting the brakes and stopping the cars. He had first

attempted to set the brake on the rear car, but was unable to do so on account of its defective condition. He then tried the brake on the forward car, and for a like reason was embarrassed and delayed in setting that in time to prevent a collision with other cars standing on the same track The brake which he was attempting to set when he was injured was what is called a *step* brake. A person setting it was required to stand with one foot —or both feet—on a step about sixteen inches below the top of the car (a box-car). And only by using one foot to assist could he make the brake operate at all. While he was thus intently engaged, and his whole attention absorbed—and necessarily so —in the attempt to perform his duties, without any notice or warning to him, the foremost car of the two which he was ordered to stop struck against cars standing on the same track. Even then it is not probable that Plaintiff would have been injured but for a farther defect on the rear car (of the two above referred to). The draw-bar and bumper were pulled out of that, and it and the forward car were fastened together by a chain. When the first car was suddenly stopped, as above stated, on account of the absence of the draw-bar and bumper on the rear car the two came together and crushed the step on which Plaintiff stood and also crushed his leg and foot so that amputation was necessary. Indeed, two or three amputations became necessary.

See Record, pages 33, 34, 35, 36, 37, 38, 42, 43, 44, 46, 47, 48, 52, 54, 55.

It is claimed that the Defendant was blamable, and is liable, for having and operating cars so out of order, and thus imperiling its employes. It is also claimed that it was blamable and liable for failing to adopt rules and regulations for the notification of its servants of such defects, so that they might guard against danger.

It is shown by the evidence that the Defendant had no such rules.

Record, pages 56, 62.

It is also shown that the defects in the cars were of long standing. The braking apparatus had *worn out.*

Record, pages 48 and 55.

As above said, while Plaintiff was attempting to set the brakes, his whole attention was taken with the performance of his duty. He had no time to observe the defects in the brakes or cars.

Record, page 53.

Nor had he prior to the injury notice or knowledge of such defects.

Record, pages 38 and 47.

Had the brakes been in order, he could have readily stopped the cars.

Record, page 52.

Or had the draw-bar and bumper not been out, the cars would not have come together.

It is contended by Defendant that the Court below erred as follows:

I.

In sustaining the challenge to the juror Weaver.

II.

In not charging that under the Statutes of Dakota the master-mechanic or other officer of the Defendant, whose duty it was to keep the cars in repair, was a fellow-servant of the Plaintiff, for whose negligence Defendant is not liable.

III.

In not charging that Plaintiff was guilty of such contributory negligence as disentitles him to recover.

IV.

In denying a new trial on condition that Plaintiff should remit part of the verdict.

V.

That the charge as to the measure of damages was erroneous.

I briefly refer to these alleged errors *seriatim*.

FIRST.

The rulings of the Court in respect to the challenges of the jurors were in all respects correct.

And further,—

I.

Even if the Court erred in allowing the challenge to the juror Weaver, it was error without prejudice, for which this Court will not reverse.

Heaston vs. Cin. Ft. Wayne R. Co., 16 Ind., 275, 279.

Atchison, T. & S. F. R. Co. vs. Franklyn, 23 Kan., 74.

Carpenter vs. Dane, 10 Ind., 130.

Morrison vs. Lovejoy, 6 Minn., 349, 350.

U. S. vs. Cornell, 2 Mason, 104, 105.

Hobbs vs. State, 8 Tex. App., 620.

Grison vs. State, 8 Tex. App., 386.

McKinney vs. State, 8 Tex. App., 626.

State vs. Lawler, 9 N. W. Rep, 698.

Sullings vs. Shakespeare, 9 N. W. Rep., 451.

Atlas Mining Co. vs. Johnson, 23 Mich., 36.

State vs. Arthur, 2 Devereux, 217.

Fuery vs. People, 2 Keys, 442, 443.

Mimms vs. State, 16 Ohio State Rep., 221, 228–9.

Irvine vs. State, 29 Ohio St., 186.

State vs. Elliott, 45 Iowa, 486.

Burns vs. Newton, 46 Iowa, 567.

West vs. Forrest, 22 Missouri, 344.

Herbert vs. Northern Pacific R. R. Co., 13 N. W. Rep., 349.

Sutton vs. Fox, 55 Wis., 531, 540.

It does not appear from the record whether the challenge was for cause or peremptory, and it cannot be questioned but that Plaintiff had the right of peremptory challenge.

It is for Defendant to *show error*.

II.

Even if all was admitted that the Appellant claims, it would not justify the reversal of the judgment. It is not denied but that the Defendant had a trial by an impartial jury. On another trial it could have no more than that. It is not in the power of this or any court to give it a trial by a jury of which Weaver shall be one. It has the right to *challenge*, not to *select*. So long as there is no legal objection to the jury which tried the case, it has, in the eye of the law, suffered no injury.

(See authorities above cited.)

SECONDLY.

The duty of maintaining machinery in proper repair for the protection of employes operating it, *devolves upon the master*, and he is liable for injuries resulting from a failure to perform such duty. Even if not expressed, *this is implied in the contract between the parties*.

No act which the master is bound to perform for the safety and protection of his servants, can be delegated so as to exonerate him from liability for an injury to the servant, caused by an omission to perform it. This is so whether the misfeasance or nonfeasance is that of a superior or inferior officer, agent, or servant, to whom the master has entrusted the duty.

The duty of a railroad company in respect of machinery and instrumentalities furnished to its employes, is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employes.

Hough vs. Railway Co., 100 U. S., 213.

Wabash Ry. Co. vs. McDaniels, 107 U. S., 459.

Chicago & Milwaukee Railroad vs. Ross, 112 U. S., 377.

The rule *Respondeat superior* applies in all such cases.

This does not trench upon the other rule that the master is not liable to one servant for the negligence of a fellow-servant. *The latter rule does not exempt the master from liability for his own negligence.*

Fuller vs. Jewett, 80 N. Y., 46.

Ford vs. Fitchburgh R. Co., 110 Mass., 241, 261.

Bessex vs. C. & N. W. R. Co., 45 Wis., 477, 481.

Shanny vs. Androscoggin Mills, 66 Me., 420, 426.

Drymala vs. Thompson, 26 Minn., 40.

Wedgwood vs. C. & N. W. Ry. Co., 41 Wis., 478; 41 id. 44.

Toledo R. R. Co. vs. Conroy, 68 Ill., 561.

The statute of Dakota relied on by defendant's counsel is merely declaratory of settled law on this subject.

Civil Code, §1130, §1131:

§ 1130. Co-employes. An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe.

§ 1131. Employer's negligence. An employer must in all cases indemnify his employe for losses caused by the former's want of ordinary care.

That Defendant's cars were out of order, and that they became so, not by any accident or violent or sudden injury, but by being *worn out*, is shown by the evidence. (See pages of Record above referred to.) The iron braking apparatus had almost worn smooth from use. This must have been the work of years. The following language of the Supreme Court of Wisconsin in a similar case is appropriate to this:

"We have said the company was under obligations to use reasonable means to guard against defects in its cars. It was bound to exercise reasonable diligence in watching its cars, inspecting them, and keeping them in repair. This duty it owed to its employes. The danger they incurred in entering the service was not to be increased by neglect or failure to perform this legal duty. And if there was a defect in the braking apparatus of the car in question, which had existed so long, or was of such a character, that the defendant by the exercise of ordinary care could have discovered and repaired it, it is liable for an injury sustained by an employe in consequence of such defect."

Bessex vs. C. & N. W. R. Co., 45 Wis., 481.

In considering the objections of Appellant, we ask the Court to bear in mind that it was not merely the brake of *one* car, but the brakes of *two* cars, that were out of order; and that, in addition, the draw bar and deadwood were pulled out of one of the cars. (See pages of Record above referred to.)

Nor are these the only acts of negligence alleged and proved. It is alleged and proved by uncontradicted evidence that, in disregard of its duty in the premises, Defendant had failed to adopt such rules and regulations for running its trains and switching its cars as would insure the safety of brakemen and other employes. (See pages of record above referred to.) That it was bound to adopt such rules, see

C. & N. W. R. Co., vs. Taylor, 69 Ill., 461, 465, 466.

Cooper vs. I. C. R. Co., 44 Iowa 135, 138, 139.

Slater vs. Jewett, 85 N. Y., 61, 73, 74.

R. Co. vs. Lavalley, 36 O. State R. 221, 226.

THIRDLY.

As to the question of contributory negligence little need be said. (See opinion of the court below. Record, page 119.)

It does not appear that there was any evidence to require or justify the charges, the refusal of which is alleged as error. The plaintiff testified that he did not see any defects in either

of the cars, and that he had no knowledge or notice of such defect. (See pages of record above referred to.) But the Court did expressly charge on this very point, and went as far in favor of defendant as either law or reason would permit. The jury were told—

"If the Plaintiff, either from the unusual appearance of the car—as, for instance, its being attached to the next car by chains —or from any statements of the yard-master or car-repairer, had reason to suppose the car in question was defective or had been broken, it was his duty to take care not to expose his person to injuries which a broken and defective car might cause."

Record, page 98.

"If the jury believe the evidence of Gilboy, that statements were made by him in presence and hearing of plaintiff that the car was broken, and that it should be taken out and repaired, that was sufficient notice to the Plaintiff that the car was defective, and he was bound to take care not to expose his person to injury on account of such defect."

Record, page 98.

"If the plaintiff was careless, heedless, or negligent at the time injury occurred, and such carelessness, heedlessness or negligence materially contributed to the injury, he cannot recover."

Record, page 99.

"But if you find from the evidence that the Defendant was guilty of negligence in not providing proper and safe machinery and appliances, in consequence of which neglect the injury was received, still if the Plaintiff failed to exercise that prudence, care and caution which a prudent man under similar circumstances ordinarily would exercise, which contributed approximately to the injury, he is not entitled to recover."

Record, page 101.

FOURTHLY.

It was competent for the court to deny a new trial on condition that Plaintiff should remit part of the verdict.

Diblin vs. Murphy, 3 Sanford, 19.

Collins vs. A. & S. R. Co., 12 Barb, 492.

Blunt vs. Little, 3 Mason, 102, 107.

Kinsey vs. Wallace, 36 Cal., 462, 480, 481.

Murray vs. Hud. Riv. R. Co., 47 Barb, 196, 205.

Doyle vs. Dixon, 97 Mass., 208, 213.

Hayden vs. Florence Sewing Machine Co., 54 N. Y., 221.

Belknap vs. R. Co., 49 N. H., 359.

Collins vs. City of Council Bluffs, 35 Iowa, 432.

Union Rolling Mills vs. Green, 100 Ill., 52.

FIFTHLY.

It is to be claimed in this Court, I believe, that the charge as to the measure of damages was erroneous. To this there are several conclusive answers:

(1) As applied to the facts of the case, the charge, even if erroneous or verbally inaccurate, could not be misleading. The injury alleged and proved was that Plaintiff "had his left leg crushed so that it became and was necessary in order to save his life to have the same amputated, and the same was amputated."

See Record, subdiv. 7 of complaint, page 3.

(2) The Defendant's counsel did not except to the charge. It is true that on September 14—the case having been tried and the verdict rendered June 4—the Defendant's counsel filed a general exception to the charge of the Court as to amount of damages.

Record, page 103.

But it will be observed that this subdivision of the bill of exceptions was of the latter date, and as a matter of fact was not before made. This of course was too late.

St. Croix Lumber Co. vs. Pennington, 2 Dakota, 467, 473.

(3) But even if it were admitted that one claim of the charge was in the respect referred to erroneous, and that an exception was taken to the charge in time, still the exception was inoperative. Much of the charge on this head is concededly correct. Under such circumstances it was incumbent on the person alleging error to clearly point out the very part alleged to be erroneous. Such a general exception as this was ineffectual.

Mobile & Montgomery Ry. Co. vs. Jurey, 111 U. S., 584, 596.

Conn. Life Ins. Co. vs. Union Trust Co., 112 U. S., 250.

Beckwith vs. Bean, 98 U. S., 284.

Beaver vs. Taylor, 93 U. S., 46.

McNitt vs. Turner, 16 Wall., 362.

Lincoln vs. Claflin, 7 Wall., 132.

Moore vs. Bank of the Metropolis, 13 Pet., 302, 310.

Walsh vs. Kelly, 40 N. Y., 556.

Crawford vs. Everson, 68 N. Y., 624.

Dean vs. C. & N. W. Ry. Co., 43 Wis., 305.

THOMAS WILSON,

Of Counsel for Defendant in Error.